IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-5981

FRANCIS RICK FERRI,

Petitioner,

v.

DANIEL ACKERMAN,

Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF PENNSYLVANIA

BRIEF FOR THE PETITIONER

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OPINIONS BELOW

The opinion of the Westmoreland County Court of Common Pleas (A. 41-45) is unreported. The per curiam affirmance order of the Pennsylvania Superior Court (A. 46) is not yet reported in the official reports but appears in the unofficial reports at 384 A.2d 995 (1978). The opinion of the Pennsylvania Supreme Court (A. 48-57) is not yet reported in the official reports but appears in the unofficial reports at 394 A.2d 553 (1978).

JURISDICTION

The final judgment of the Pennsylvania Supreme Court sustaining respondent's assertion of an absolute immunity by virtue of commission held or authority exercised under the United States, and affirming the dismissal of petitioner's complaint, was entered on November 18, 1978. A Petition for Certiorari was filed on January 2, 1979, and certiorari was granted on February 21, 1979. The jurisdiction of this Court to review this case by writ of certiorari is conferred by 28 U.S.C. §1257(3).

STATUTES INVOLVED

Rule 44 of the Federal Rules of Criminal procedure provides in pertinent part:

a. Right to Assigned Counsel. Every defendant who is unable to obtain counsel shall be entitled to have counsel assigned to represent him at every stage of the proceedings. . . .

b. Assignment Procedure. The procedures for implementing the right set out in subdivision (a) shall be those provided by law and by local rules of court established pursuant thereto.

The Criminal Justice Act of 1964, Pub.L.No. 88-455, §2, 78 Stat. 552 (18 U.S.C. §3006A), as amended, is set forth in pertinent part in Appendix A.

The Criminal Justice Act Plan for the United States District Court for the Western District of Pennsylvania, adopted pursuant to the direction of 18 U.S.C. §3006A(a), also is set forth in pertinent part in Appendix A.

QUESTION PRESENTED

Whether a private attorney, appointed under the Criminal Justice Act (18 U.S.C. §3006A) as defense counsel in a federal criminal prosecution, whose neglect directly results in defendant's conviction and sentencing on three counts on which the statute of limitations had run, enjoys an absolute federal common-law immunity from a common-law action brought by his former client in a state court.

STATEMENT

On August 28, 1974, an indictment was filed against Francis Rick Ferri, the petitioner herein, in the United States District Court for the Western District of Pennsylvania (Appendix B).[1] Among the charges contained in the multi-count indictment were three allegations of Internal Revenue Code firearms violations for which the three-year statute of

[1]Instead of attaching a copy of the indictment and sentencing order to his complaint in the subsequent malpractice action, Ferri, unfamiliar with the rules of judicial notice, merely directed the state trial court to "[t]he complete record(s) of Criminal [sic] Number 74-277, U.S.D. Court, for the Western District of Pennsylvania, which is Plaintiff [sic] issue of negligence herein" (A. 10). Petitioner now asks that this Court as well judicially notice these public documents. *See Massachusetts v. Westcott*,431 U.S. 322, 323 n.2 (1977) and the cases cited therein. For the convenience of the Court, and with the approval and consent of counsel for respondent, copies of the indictment and the docket sheet reflecting the sentence imposed are affixed to this brief as Appendix B.

limitations had run (A. 31).[2]

In December, 1974, Ferri appeared in the federal district court, without counsel, to answer the indictment (A. 7). Pursuant to the mandate, and in accordance with the procedures, of the Criminal Justice Act of 1964 and the local rules promulgated thereunder, the trial judge appointed respondent Daniel Ackerman, a member of the Pennsylvania Bar, to represent the defendant at trial (A. 7,8,26). At no time during the pretrial proceedings, the course of the trial or thereafter did Ackerman assert a statute of limitations defense on Ferri's behalf (A. 31). Accordingly, the guilty verdicts returned by the jury on March 6, 1975, included the three Internal Revenue Code violations as well as a conspiracy (18 U.S.C. §371) to commit and the completion of a substantive offense under 18 U.S.C. §844(i) (A. 9,34;

[2]Because of the posture of the case—plaintiff's action was dismissed pursuant to defendant Ackerman's demurrer—this Court is bound, of course, to accept the allegations contained in Ferri's pleadings as true and to construe them in the light most favorable to him. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Conley v. Gibson*, 355 U.S. 41, 45 (1957). Petitioner nonetheless invites the Court's attention to the record herein as proof of the substantiality of his contentions. Counts Seven, Eight and Nine of the Indictment charge violations of the various subdivisions of 26 U.S.C. § §5861 and 5871 (A.34; Appendix B). The isolated incident claimed by the Government as the basis for these charges allegedly took place in its entirety on August 26, 1971 (Appendix B). Despite the unambiguous applicability of a three-year statute of limitations for such Internal Revenue Code offenses, *see* 26 U.S.C. §6531, the indictment was not filed until Wednesday, August 28, 1974 (Appendix B).

Because Counts One and Two charge violations of the Criminal Code, they are subject only to a five-year statute of limitations, 18 U.S.C. §3282, and prosecution thereunder was not time barred. Counts Three, Four, Five and Six do not name Ferri.

The complaint, as amended, therefore, only charges Ackerman with malpractice in connection with Counts Seven through Nine.

Appendix B). A ten-year sentence was imposed on each of the Internal Revenue Code counts to run concurrent with each other but consecutive to the maximum twenty-year sentence imposed on the §844(i) substantive count (Appendix B).[3] The conspiracy charge drew a five-year sentence to run concurrently with the twenty-year sentence.

Shortly after the conviction, Ackerman ceased his representation of Ferri (A. 9),[4] and new counsel pursued an appeal to the United States Court of Appeals for the Third Circuit. Apparently during the course of his examination of the record, appellate counsel discovered the statute of limitations bar to the counts under the Internal Revenue Code. On appeal, therefore, counsel contended that the convictions thereunder were invalid (A. 38-39).

While that appeal was pending, Ferri commenced the instant action *pro se* in the Pennsylvania Court of Common Pleas in Union County (A. 25). The complaint, filed March 4, 1976, was styled "A Complaint in Negligence" and contained sixty-eight allegations of Ackerman's ineffective representation (A. 6-22). Defendant Ackerman responded with a series of preliminary objections including a motion for change of venue (A. 24-27). Most important,

[3]It is this ten-year differential which is alleged to be attributable to defendant Ackerman. In a contemporaneously filed malpractice action against prior counsel, Ferri charges that files lost by that attorney, Dominick Rossetti, contained governmental promises of immunity from the subsequent indictment and conviction under §844(i). A petition for certiorari in that action, *Ferri v. Rossetti*, 78-6153, is currently pending before this Court [reported below at 396 A.2d 1193 (1979)].

[4]The relationship between Ferri and Ackerman was never a good one. During the course of the trial, Ferri complained continuously about the quality of counsel in memoranda, letters and petitions to the district judge. (A. 9).

defendant sought dismissal of the complaint for its failure to state a cause of action, asserting that, by virtue of his appointment under the Criminal Justice Act, "defendant was and is immune from any civil liability, or from any other liability arising from his conduct of the defense of Francis Ferri" (A. 26).

The motion for venue change was granted and the action was transferred to Westmoreland County. By the time of the transfer, however, plaintiff had twice amended his complaint. The first amendment, filed April 2, 1976, supplemented the claim of negligence with two additional common-law claims, one sounding in malpractice and one, relying on a "third party beneficiary theory," alleging breach of contract (A. 28). The second amendment, filed August 18, 1976, simply "reserve[d] the right to amend the original complaint as factual data surface regarding the Defendant's actions in the complained of Criminal Proceedings" (R.- "Plaintiff's Amended Complaint and Petition to Proceed with a Jury Trial"). Such "data" were not long in surfacing.

On October 15, 1976, the United States Court of Appeals affirmed Ferri's conviction by order. *Ferri v. United States,* 546 F.2d 416 (3d Cir. 1976).[5] The unpublished judgment order (A. 38-40) rejected Ferri's eight allegations of reversible error virtually without comment. On each ground, however, the court included a footnote containing citations of authority for its disposition of the claim (A. 39). The footnote following the rejection of the statute of limitations claim cited

[5]The unpublished order is stamped "Filed November 3, 1976". The substance of the order, however, was known to petitioner in mid-October as evidenced by his "traversal" brief (A. 30-33). Furthermore, the report of the order in the Federal Reporter lists the filing date as October 15. Petitioner knows of no reason for this discrepancy.

three federal circuit court decisions. Each of these cases held that a statute of limitations defense will be deemed to have been forfeited if not raised before or during the trial (A. 39). *See United States v. Askins,* 251 F.2d 909, 913 (D.C. Cir. 1958); *United States v. Waldin,* 253 F.2d 551, 558-559 (3d Cir. 1958); *United States v. Kenner,* 354 F.2d 780, 785 (2d Cir. 1965), *cert. denied,* 383 U.S. 958 (1966). In addition, the footnote quoted from *Biddinger v. Commissioner of Police,* 245 U.S. 128, 135 (1917), in which this Court held that "[t]he statute of limitations is a defense and must be asserted on the trial by the defendant. . . ."

Within three days of the affirmance by the Third Circuit, Ferri filed a document which he termed a "Traversal Brief of Plaintiff". Although Ackerman was later to argue to the Pennsylvania Supreme Court that the contents of this document were not properly regarded as an amended pleading, the supreme court, in its opinion, rejected this contention: "In view of the fact that these pleadings were filed without the benefit of counsel, and the question was clearly raised in the court below, we decline to dispose of the issue based upon this procedural irregularity." (A. 49 n.1).

In this "traversal", Ferri raised for the first time the issue which had just come to his attention — the waiver of the statute of limitations by counsel's failure to raise it during the course of the trial. (A. 31 n.1). The "traversal" also dispensed with the earlier sixty-eight allegations of ineffective representation and stated plaintiff's intent to confine his complaint to this "specific failure of the defendant" (A. 30). While alleging a deprivation of his constitutional rights under several of the Amendments to the United States Constitution [including the Fifth, Sixth[6] and Equal Pro-

[6]Ferri's contention was that Ackerman's failure to invoke the statute of limitations satisfied the standard of the "mockery, sham and farce" test. (A. 33).

tection Clause of the Fourteenth], Ferri continued to rely exclusively on state common law — malpractice and negligence — as providing the remedy for such unconstitutional conduct (A. 31,33).[7] Attached as exhibits to the "traversal" were portions of the briefs before the Third Circuit.

On January 31, 1977, the Westmoreland County Court of Common Pleas, sitting *en banc,* sustained defendant Ackerman's claim of absolute immunity and, accordingly, dismissed plaintiff's complaint (A. 41-45). After an order without opinion by the Pennsylvania Superior Court (A. 46), the Pennsylvania Supreme Court granted permission to appeal. Both Ferri, who had continued to proceed *pro se,* and counsel for Ackerman submitted their briefs without oral argument on September 26, 1978, and the supreme court handed down its decision on November 18, 1978.

Writing for four members of the court, Justice Nix treated the case as raising only a federal question. Citing *Howard v. Lyons,* 360 U.S. 593 (1959), he noted:

> "Since we are here concerned with an asserted immunity protecting a participant in a federal legal proceeding, we are required to look to the federal law to determine whether it exists and if it does, its nature and scope" (A. 49).[8]

Identifying federal law as the source of the answer to the immunity question, the majority directed its attention to a

[7] In the "traversal", Ferri also noted that no petition for a writ of habeas corpus pursuant to 28 U.S.C. §2255 had yet been filed. (A. 32).

[8] Indeed, true to its view of the case as raising solely a federal question, the majority's opinion neither cites nor refers to any Pennsylvania decision or state common-law doctrine. It should be noted that this decision does not involve an incorporation of federal law into state law. Justice Nix's decision makes clear that the court believed resort to federal law was "required". (A. 49).

series of United States Supreme Court decisions establishing the absolute immunity of judges for all acts allegedly performed within the scope of their official duties (A.50-53). The prudential concerns which prompted such an immunity were, as the Pennsylvania Supreme Court saw it, not limited to judges. Noting that "[t]he common law also recognized a need to extend this protection to other participants in judicial proceedings," the majority referred to the extension of absolute immunity to prosecutors by the United States Supreme Court [*see Imbler v. Pachtman,* 424 U.S. 409 (1976)], and to federal defense counsel by two summary decisions of the United States Courts of Appeals [*see Sullens v. Carroll,* 446 F.2d 1392 (5th Cir. 1971); *Jones v. Warlick,* 364 F.2d 828 (4th Cir. 1966) (*per curiam*)] (A. 52-54).To support this broad brush grouping of judges, prosecutors and defense counsel, the court concluded its opinion with a quotation from *Butz v. Economou,* 438 U.S. ____ , 98 S.Ct. 2894, 2913 (1978):

> "Absolute immunity is thus necessary to assure that judges, advocates, and witnesses can perform their respective functions without harassment or intimidation."

The four man majority in the Pennsylvania Supreme Court was joined by a fifth who concurred in the result without explanation (A. 55). Justice Roberts filed a dissent on behalf of two members of the court arguing that (i) appointed counsel need no more discretion or freedom than do privately-retained counsel; (ii) defense counsel appointed under the Criminal Justice Act do not act under color of federal law; and (iii) serious equal protection problems would be posed by the disparate treatment of retained and appointed counsel (A. 56-57).

On January 2, 1979, Ferri filed a petition for a writ of certiorari *pro se.* On February 21, the petition was granted and on March 26, counsel for Ferri was appointed by this Court. This is the first time in the course of this litigation that plaintiff-petitioner has had the benefit of counsel.

SUMMARY OF ARGUMENT

I

In *Howard v. Lyons,* 360 U.S. 593 (1959), this Court concluded that, in a state common-law action, the immunity of "officers of the Federal Government" is a question to be judged by federal standards. The Pennsylvania Supreme Court erroneously believed itself constrained by *Howard* to decide the immunity of a private attorney, appointed under the Criminal Justice Act, by resort to applicable federal standards. Counsel appointed under the Act do not, simply by virtue of federal compensation, become officers of the federal government. The legislative history reveals a congressional desire to compensate, not to federalize, the provision of legal assistance for indigents. Indeed, the deletion in the original Act of provisions for a federal defender was explicitly attributed to a desire to ensure the independence of criminal defense counsel. As explained in the House Report to the 1970 Amendments, "[t]he provision was deleted due to doubts raised. . . about the propriety of placing the defense of criminal suspects in the control of the Government since the Government [is] also responsible for prosecutions." H.R. Rep. No. 1546, 91st Cong., 2d Sess. (1970). The private bar segment of the Criminal Justice

Act, on the other hand, has always been viewed as independent of any governmental control. This has prompted the various United States Courts of Appeals to conclude with unamimity that appointed counsel are neither federal "employees" for purposes of the Federal Tort Claims Act nor actors "under color of law" for suits brought directly under the Constitution. In a similar vein, the view that a state-appointed counsel acts "under color of law" within the meaning of 42 U.S.C. §1983 has been uniformly rejected. The common theme of these decisions has been a view of court-appointed counsel as no less private by virtue of government compensation than their retained counterparts.

The present litigation is purely between private parties and does not touch the rights and duties of the United States. Likewise, it will have no direct effect upon the United States Treasury. As this Court recently recognized in *Miree v. DeKalb County,* 433 U.S. 25 (1977), the government's interest in such state common-law actions is far too speculative and far too remote to justify the application of federal common law. The issue whether to displace state law on a matter such as this is primarily a decision for Congress. Congress has taken no such action here. Quite to the contrary, despite the acknowledged existence of a common-law history of malpractice actions against lawyers by dissatisfied clients, not a single congressman urged immunity for appointed counsel.

II

The Pennsylvania Supreme Court compounded its erroneous decision to focus on federal standards by misconstruing what those standards are. Federal officials who

seek absolute exemption from personal liability must bear the burden of showing that public policy requires an exemption of that scope. This Court has, in recent years, accorded absolute common-law immunity to only two classes of government officials: those performing an adjudicatory role, and those performing a prosecutorial role. The decision below extended absolute immunity to court-appointed counsel solely by virtue of his participation in judicial proceedings. This type of approach, focusing on the location of the officer rather than on the characteristics of his duties, has been criticized by this Court on more than one occasion as "overly simplistic." *Imbler v. Pachtman,* 424 U.S. 409, 421 (1976). As *Imbler* indicates, the immunity of a federal officer must be "predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." 424 U.S. at 421. There is simply no history of common-law immunity for appointed counsel. In part, this is due to the recent vintage of the recognition of the government's obligation to provide counsel for the indigent defendants. Yet as this Court has often recognized, the paucity of common-law history may be remedied by analogizing the functions of the "new office" to those of an office existing at common law. The issue for resolution, therefore, narrows to whether the functions of appointed counsel more closely parallel those of judges and prosecutors - traditionally accorded immunity at common law - or those of private counsel who enjoyed no such immunity. Merely to pose the question is to suggest the answer. Counsel appointed under the Criminal Justice Act owes his primary obligation to the defendant and not to the court or the public at large. His duties, burdens and responsibilities are exactly the same as those of private, retained counsel. The Act's purpose was to create a system

of compensated appointed counsel, independent of government control and free to perform their functions in as nearly as possible the same manner as if privately retained. Congress did not thereby create a new function, it merely made available an already existing one to those without financial means.

Immunity is not granted for the benefit of the erring official. It is, instead, intended solely for the benefit of the public interest. Absolute immunity is afforded judges and prosecutors in order to insure that their loyalties are not divided between the imposed duty to the public and the natural instinct to protect oneself from suit. The key concern in these decisions has been the tension or conflict that exists between the public need and the fear of suit. An appointed counsel, on the other hand, is not a servant of the public. His duty is undivided. He serves only the client for whose representation he has been appointed. It is difficult to see, therefore, how potential liability for failing to provide a competent defense divides a lawyer's loyalties between himself and the person he is supposed to defend. Quite to the contrary, it is the grant of immunity which would raise the spectre of divided loyalties. At the very same time that he is representing the indigent pursuant to his appointment, the appointee is maintaining a private practice. The private practice, of course, is potentially a source of a common-law malpractice action. There has always been the concern that the busy lawyer who receives an appointment will render a perfunctory service at best. How much more serious is this concern, however, where only the paying portion of his practice may subject the attorney to malpractice liability. It calls for little speculation to predict that a lawyer, hard pressed for time, will be likely to devote an inappropriate percentage of his energies to the portion of his practice which

carries with it the possibility of liability for substandard work. The professional duty to the indigent is here at odds with the natural instinct to protect oneself from suit. Ironically, therefore, the very tension which the grant of immunity to judges and prosecutors was adopted to alleviate would instead be promoted by a similar grant of immunity to a court-appointed counsel.

III

American common law has never accorded immunity to retained criminal defense counsel. The creation and application of a different rule for those paid to represent indigent criminal defendants would result in the denial, solely on the basis of poverty, of two inherently fundamental rights: the right to the effective assistance of counsel and the right of access to the courts. The first of these is prophylactic. The second is compensatory.

Too many important constitutional rights may be lost by the actions of one's attorney to demand anything but an uncompromising, competent lawyer with undivided loyalty to his client. A counsel without accountability poses far greater dangers of ineffectiveness. It is just such a concern which prompted D.R.6-102 of the ABA Code of Professional Responsibility [prohibiting a lawyer from entering into contractual relationships "to exonerate himself from or limit his liability to his client for his personal malpractice"]. A lawyer who handles the affairs of his clients properly has no need to limit his liability. The lawyer who fails to afford the appropriate standard of service, on the other hand, should not be permitted to escape accountability. ABA *Code of Professional Responsibility* E.C. 6-6. Counsel for indigents

generally need an extra push to ensure that they pursue their client's interests as zealously as would retained counsel. To fail to provide even the *same* push that is experienced by retained counsel contravenes the requirements of equal protection. The grant of absolute immunity would establish a lower standard of care for the poor man's lawyer.

There is, of course, no constitutional right to sue for malpractice. Once such an action has been accorded by statute or common law, however, "it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause." *Lindsey v. Normet,* 405 U.S. 56, 77 (1972). Absolute immunity deprives an indigent of the only effective means of recovering for liberty lost by virtue of incompetent counsel. In contrast, the person with means to retain counsel is permitted free access to the courts for the identical injury. Assuredly, such classification requires some assertion of a compelling or at least significant governmental reason. Yet not even a rational basis justifying the distinction appears evident. All of the arguments that have been pressed for the grant of absolute immunity apply with equal force to retained counsel. When the articulated justifications are swept aside as facade, all that remains is a fear that the indigent will be more litigious and more likely to press frivolous claims. Our Constitution prohibits such invidious generalizations and this Court ought not allow them to serve as the basis for a discriminatory common-law doctrine of immunity.

ARGUMENT

I.

THE QUESTION OF WHETHER A PRIVATE ATTORNEY, APPOINTED TO REPRESENT AN INDIGENT DEFENDANT UNDER THE CRIMINAL JUSTICE ACT, MAY BE SUED FOR COMMON-LAW MALPRACTICE DOES NOT REQUIRE DECISION UNDER FEDERAL COMMON LAW.

In *Howard v. Lyons,* 360 U.S. 593 (1959), this Court held that, in a state defamation action, the immunity of "officers of the Federal Government, acting in the course of their duties" is a question to be judged by "federal standards" formulated by the courts. *Id.* at 597. *See also Butz v. Economou,* 438 U.S. ____, 98 S.Ct. 2894, 2911 n. 34 (1978) ["federal officials" sued for traditional remedies at state law for alleged transgressions should be entitled to a qualified federal common-law immunity]. The Pennsylvania Supreme Court believed itself constrained by *Howard* to decide the immunity of court-appointed counsel in federal criminal proceedings by resort to applicable federal standards.[9] While it subsequently misconstrued what those standards are, *see* Point II, *infra,* its threshold error was in focusing on federal common-law standards at all. Counsel appointed under the Criminal Justice Act do not, by virtue of

[9]The question of what immunity a court-appointed counsel might enjoy under state law was not addressed by the court. Indeed, the Pennsylvania Supreme Court seems never to have passed on the question of the immunity of state court-appointed counsel from similar malpractice actions.

the federal compensation received, become "officers" of the federal government. Federally-imposed immunity has no more place in defining the scope of a court-appointed counsel's immunity from state common-law malpractice and tort actions commenced in a state court than it would in a similar action against retained counsel. Where, as here, we deal neither with "the authority of a federal officer" nor with the "functioning of the Federal Government", *Howard*'s mandate to look to federal common law is simply inapplicable. Since the litigation is between private parties and no substantial rights or duties of the United States hinge on its outcome the question of immunity does not require decision under federal common law. *Miree v. DeKalb County,* 433 U.S. 25 (1977). The issue of whether to displace state law on an issue such as this is primarily a decision for Congress. *Id.* at 32. Congress has chosen not to do so in this case.[10]

A. Both the Legislative History and Operational Structure of the Criminal Justice Act Manifest an Intent to Keep Appointed Counsel Independent of any Association with or Control by the Federal Government.

At least since *Johnson v. Zerbst,* 304 U.S. 458 (1938), it has been clear that the Sixth Amendment requires appointment of counsel in federal criminal prosecutions. *See also Gideon v. Wainwright,* 372 U.S. 335, 348 (1963) (Clark, J., concurring). Prior to the enactment of the Criminal Justice

[10]That the state court's reliance on federal law was inappropriate does not, of course, deprive this Court of jurisdiction where, as here, a federal immunity was "specially set up or claimed" under a statute, "or commission held or authority exercised under, the United States." 28 U.S.C. §1257(3).

Act of 1964, Pub.L.No. 88-455, §2, 78 Stat. 552 (codified at 18 U.S.C. §3006A(1976)), the federal system, however, failed to compensate assigned counsel. This lack of financing resulted in lawyers disposing of their assignments with inappropriate dispatch and insufficient investigation. Report of the Special Committee of the Association of the Bar of the City of New York and the National Legal Aid and Defender Association, *Equal Justice for the Accused* 67 (1959). It was to remedy this situation that the Criminal Justice Act was enacted. That the Act was designed primarily to compensate and not to federalize the provision of legal assistance in federal criminal prosecutions is amply evinced by the legislative history.

The original bill passed by the Senate in 1963 had included a provision authorizing a federal public defender system as well as a system for compensating private appointed counsel. The House removed the public defender provision and the conference committee resolved differences in favor of the House position. As explained in the House Report to the 1970 Amendments, "[t]he provision was deleted due to doubts raised in the House about the propriety of placing the defense of criminal suspects in the control of the Government since the Government was also responsible for prosecutions." H.R. Rep. No. 1546, 91st Cong., 2d Sess. *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS 3982, 3984. The 1964 House debates bear this out. Congressman Arch A. Moore, Jr., the author of the bill that emerged from the conference committee and became the Act, decried the Senate version of the bill for its attempted establishment of a federal defender office and noted:

> "This would have had the effect of placing the administration of justice totally in the hands of the Federal Government. An individual, accused of a crime, would have been tried before a Federal judge, prosecuted by a Federal district attorney, and defended by a Federal public defender. Thus, the total right to a fair trial and to the preservation of one's right to liberty would be solely dependent upon men appointed by the Federal Government and compensated out of the Federal Treasury." 110 CONG. REC. 18558 (August 7, 1964).

Similar concerns were voiced by several of the major proponents of the House version. *See, e.g.*, the remarks of Congressman Willis ("this sort of system is contrary to our time-honored system of checks and balances"), 110 CONG. REC. 448 (January 15, 1964); Congressman Moore ("totally inconsistent with even-handed justice, democratic society, and good common sense"), 110 CONG. REC. 445 (January 15, 1964); and Congressman McCulloch ("Most fearful, however, is that clear and present danger that would exist to our basic liberties if a Federal public defender system was established"), 110 CONG. REC. 455 (January 15, 1964).

Although the 1970 Amendments to the Criminal Justice Act, Pub.L.No. 91-477, §1, 84 Stat. 916, eventually did create a federal public defender system, the concern about its lack of independence from the federal government continued. In the study (commissioned in 1967 by the Judicial Conference of the United States in conjunction with the Department of Justice) which served as the foundation for the 1970 Amendments, Professor Dallin H. Oaks of the University of Chicago Law School noted the comparative advantages and disadvantages of the private appointed counsel and public defender systems. Among the major disadvantages of the latter, he listed the inability of the federal defender to be "as vigorously independent" as appointed counsel. *Hearings before the Subcomm. on*

Constitutional Rights of the Senate Judiciary Comm. on S. 1461, 91st Cong., 1st Sess., 305-306 (1969). In partial recognition of this concern, the 1970 Amendments to the Criminal Justice Act adopted a "mixed system" which continued participation by the private bar in the defense of indigents in federal criminal prosecutions while at the same time establishing federal defender organizations. As noted in the House Report: "S. 1461 is expressly tailored to meet earlier objections to the concept of a Federal public defender system by making active and substantial participation by private attorneys basic to any district plan for representation. The use of appointed private counsel can be supplemented but not replaced." H.R. Rep. No. 1546, 91st Cong., 1st Sess., *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS 3982, 3985.

The independence of the private bar segment of the Criminal Jusice Act is more than merely theoretical. The entire operational structure of §3006A is one of non-supervision. Although paid with funds from the United States Treasury, when appointed by the courts to represent a defendant, counsel "function[s] independently of any agency of the Government and in a truly adversary action." *United States v. Robinson,* 553 F.2d 429, 430 (5th Cir. 1977), *cert. denied,* 434 U.S. 1016 (1978).

Under the Internal Operating Procedures of the Western District of Pennsylvania Criminal Justice Act Plan, an attorney who desires to be listed on the panel applies to the Federal Public Defender who evaluates his background and qualifications and then makes a recommendation to the court (A. 36). When a person who is financially eligible appears before the district court charged with a felony or misdemeanor, counsel will be appointed for him (Section III A(1) of Western District Plan set forth in Appendix A).

Where counsel has previously undertaken to represent the defendant, whether at defendant's request or otherwise, prior to his presentation before a judicial officer, such counsel may seek appointment and compensation from the court. If such counsel appears on the approved panel, compensation may be made retroactive to cover time expended during the arrest period (Section III B(1)). It nonetheless remains true that defendant does not have the right to select his appointed counsel from the list of attorneys (Section V A(3)). The Western District's "mixed plan" provides for "private attorney appointments" in at least twenty-five percent of all cases involving eligible indigent defendants (Section V B). These aptly-named "private attorney appointments" have no continuing employment arrangement with the government, are not furnished with an office or secretarial support, maintain a concurrent and unlimited private, retained practice and do not appear to the client as a person cloaked with the authority of the state. *See* Oaks Report, *Hearings on S. 1461, supra,* at 306, for the difference in client perceptions of appointed counsel and public defenders.[11]

[11]It is interesting to note that the 1977 Annual Report of the Director of the Administrative Office of the United States Courts, in its listing of "Personnel in the U.S. Judiciary", lists public defenders but make no mention of private appointed counsel. Report at 27 (Table XI). Thus, it is clear that the client is not alone in perceiving the two categories as having distinctly different relationships with the federal government.

B. The United States Courts of Appeals Have Been Unanimous in Concluding That Neither Federal nor State Court-Appointed Counsel are Government Officers, Government Employees or Act Under Color of Governmental Authority.

The precise issue presented here — whether a court-appointed counsel in a federal prosecution sued in a state court for common-law malpractice or tort is to be deemed a federal official for the purpose of cloaking him with federal immunity — has never before been addressed by any appellate court. *But see Sullens v. Carroll,* 446 F.2d 1392 (5th Cir. 1971) [*see* fn. 14, *infra*]. A number of analogous situations, however, point to a negative answer to this query.

The Federal Tort Claims Act, 28 U.S.C. §1346(b), permits suit for negligence against the United States for the conduct of its "employees". In *Jones v. Hadican,* 552 F.2d 249 (8th Cir.), *cert. denied,* 431 U.S. 941 (1977), plaintiff attempted to sue the United States for the legal malpractice of his federally-appointed counsel. Rejecting the notion that a Criminal Justice Act appointment made one an "employee of the United States", the Eighth Circuit affirmed the dismissal of the complaint, noting that "the United States had no right to control [counsel's] representation of [defendant]." 552 F.2d at 251 n. 4. There are no other federal appellate decisions on the issue.

A number of individuals have attempted to sue their federally-appointed counsel directly under the Constitution, invoking a remedy paralleling that recognized in *Bivens v. Six Unknown Federal Narcotics Agents,* 403 U.S. 388 (1971).[12] Reasoning that a *Bivens*-type suit requires "federal

[12] *Bivens*, of course, limited its specific holding to claims under the Fourth Amendment. Whether similar general constitutional remedies may be implied from the Sixth Amendment's guarantee of the effective assistance of counsel is a question not yet faced by this Court.

action" in the same manner as 42 U.S.C. §1983 requires "state action", the United States Courts of Appeals for the First and Second Circuits (the only ones squarely to face the question) have concluded that Criminal Justice Act appointees are merely "private individuals not acting under color of law". *Housand v. Heiman,* ____ F.2d ____ (2d Cir. March 20, 1979), slip op. at 1827, 1829-1830; *Page v. Sharpe,* 487 F.2d 567 (1st Cir. 1973). In so holding, these courts took their cue from the unanimous conclusions of the various circuits to the effect that state court-appointed counsel do not act under "color of law" within the meaning of §1983. *See, e.g., O'Brien v. Colbath,* 465 F.2d 358, 359 (5th Cir. 1972); *Mulligan v. Schlachter,* 389 F.2d 231, 233 (6th Cir. 1968); *French v. Corrigan,* 432 F.2d 1211, 1214-1215 (7th Cir. 1970), *cert. denied,* 401 U.S. 915 (1971); *Barnes v. Dorsey,* 480 F.2d 1057, 1061 (8th Cir. 1973); *Szijarto v. Legeman,* 466 F.2d 864, 864 (9th Cir. 1972) (*dictum*); *Espinoza v. Rogers,* 470 F.2d 1174 (10th Cir. 1972). *See also Thomas v. Howard,* 455 F.2d 228, 229 (3d Cir. 1972) [volunteer attorney in post-conviction proceeding did not act under color of law]. There are no decisions to the contrary.[13] Indeed, some circuits have even concluded that *public defenders* do not act under color of state law, *see Slavin v. Curry,* 574 F.2d 1256, 1265 (5th Cir. 1978); *Espinoza v. Rogers,* 470 F.2d 1174 (10th Cir. 1972), although this more difficult question has not been resolved

[13] In one reported decision, *Minns v. Paul,* 542 F.2d 899 (4th Cir. 1976), *cert. denied,* 429 U.S. 1102 (1977), the Fourth Circuit found it unnecessary to reach the state action question in light of its finding of immunity under §1983. Such an approach is difficult to understand. It seems "obvious that the state action question, a require ment for subject matter jurisdiction, must be weighed prior to a consideration of immunity." *Robinson v. Bergstrom,* 579 F.2d 401, 404 (7th Cir. 1978).

with unanimity. *See Robinson v. Bergstrom,* 579 F.2d 401, 404-408 (7th Cir. 1978). *See also Brown v. Joseph,* 463 F.2d 1046, 1047-1049 (3d Cir. 1972), *cert. denied,* 412 U.S. 950 (1973) [court apparently assumes, without deciding, that public defender does act under color of state law, although it indicates that such color of law would be "difficult" to perceive]; *Miller v. Barilla,* 549 F.2d 648, 650 (9th Cir. 1977) [court notes in dicta that state action claim, as applied to public defender, is "tenuous"]. Even those decisions which find state action in the conduct of defender organizations, however, have been quick to distinguish the situation of appointed counsel. In *Robinson, supra,* 579 F.2d at 405, *quoting French v. Corrigan, supra,* 432 F.2d at 1214, for example, the Seventh Circuit noted that private attorneys appointed to defend indigents " 'were not functionaries of the state but were proceeding in their private capacity'."

In sum, therefore, there is not a single federal decision which has held that mere governmental compensation to private counsel for the representation of indigents in criminal prosecutions invests that individual with color of law or badge of office.[14] This current state of the law conforms in all respects with the vision of the drafters of the original Criminal Justice Act — to compensate rather than federalize the representation of indigents.

[14]Neither *Jones v. Warlick,* 364 F.2d 828 (4th Cir. 1966), nor *Sullens v. Carroll,* 446 F.2d 1392 (5th Cir. 1971), the two summary decisions relied on by the Pennsylvania Supreme Court appears to have considered the question. Both seem to find immunity regardless of the defendant's status as an officer. Indeed, in *Sullens, supra,* the Fifth Circuit concluded that "court-appointed counsel are immune from suit *the same as* federal officials are." (emphasis added). In any event, later decisions in the Fifth Circuit clearly find no color of law involved in the conduct of appointed counsel. *O'Brien v. Colbath,* 465 F.2d 358, 359 (5th Cir. 1972). The Fourth Circuit, on the other hand, believes the question to be still open. *Minns v. Paul,*542 F. 2d 899, 900 (4th Cir. 1976), *cert. denied,* 429 U.S. 1102 (1977). *See* fn. 13, *supra.*

C. No Substantial Rights or Duties of the United States Hinge on the Outcome of This State Litigation Between Private Parties.

Underlying the command of *Howard v. Lyons,* 360 U.S. 593 (1959), to look to federal common law when testing the validity of a defense by a federal officer, sued for having committed a state common-law tort in the course of his official duties, is the recognition of the clear and substantial government interest in the efficient operations of its agencies and instrumentalities. Defendant in *Howard* was the Commander of the Boston Naval Yard, sued for alleged defamatory material contained in an official memorandum, copies of which had been mailed to members of the Massachusetts congressional delegation. The defendant's authority to act derived solely from federal sources and the scope of his authority to make privileged statements "in the course of duty" involved a question the resolution of which directly affected "the effective functioning of the Federal Government." It is hardly surprising, therefore, that Mr. Justice Harlan concluded: "[n]o subject could be one of more peculiarly federal concern, and it would deny the very considerations which give the rule of privilege its being to leave determination of its extent to the vagaries of the laws of the several States." 360 U.S. at 597.

An entirely different situation is presented by the instant case. There is here no clear and substantial interest of the national government, no significant threat to any identifiable federal policy or interest and no matter essentially of federal character. The Pennsylvania Supreme Court's decision to look to federal law in gauging the scope of Ackerman's defense may be thought to rest on two perceived federal interests: (1) that defendant was a federal actor acting pursuant to federal authority; or (2) that the tortious act

alleged arose during the course of a federal legal proceeding. Neither justification for resort to federal common law in an action based solely on state law withstands analysis.

That the defendant cannot be considered a federal actor has already been demonstrated. He cannot be sued as such under the Constitution, *see Housand v. Heiman*, ____ F.2d ____ (2d Cir. March 20, 1979), slip op. at 1827. The Federal Government is not responsible for his negligence as they would be for that of a federal employee, *see Jones v. Hadican*, 552 F.2d 249, 251 n.4 (8th Cir.), *cert. denied*, 431 U.S. 941 (1977). His state equivalent does not act under "color of law" within the jurisdictional requirements of 42 U.S.C. §1983. *See, e.g., French v. Corrigan*, 432 F.2d 1211, 1214-1215 (7th Cir. 1970), *cert. denied*, 401 U.S. 915 (1971).

To be sure, there are connections between the court-appointed counsel and the government. The court selects him for the panel from the list given it; it appoints him to the specific case; and the Administrative Office pays him for his services. But these are simply not enough. Indeed, one court has perceptively noted that, far from constituting action of the government, the appointed counsel is obligated to "oppose the efforts of the state." *Vance v. Robinson*, 292 F.Supp. 786, 788 (W.D.N.C. 1968). An attorney's allegiance is to his client, not to the person who happens to be paying him for his services. *Spring v. Constantino*, 168 Conn. 299, 362 A.2d 871 (1975). Moreover, payment by the government does not endow the lawyer with any powers not already possessed by virtue of being licensed to practice. Indeed, should he desire to do so without compensation, he could represent the defendant absent any appointment at all. *See* Mallen, *The Court-Appointed Lawyer and Legal Malpractice—Liability or Immunity*, 14 Amer.Crim.L.Rev. 59, 62 (1976). As the Chief Justice noted several years ago, "defense counsel who is appointed by the court . . . has exactly the same duties and burdens and responsibilities as the highly paid, paid-in-advance criminal defense lawyer." Burger, *Counsel for the Prosecution and Defense - Their Roles Under the Minimum Standards*, 8 Amer.Crim.Law.Q. 1, 6 (1969). *See also* ABA *Standards Relating to the Defense Function*, Section 3.9 (1971). In short, the status of a Criminal Justice Act appointee is no different, for these purposes, than that of retained counsel. The mere fact that the latter is paid by the individual with means and the former by the Government on behalf of the individual without such means is an inadequate basis for resort to federal standards in a state common-law action. No more than with the private physician paid for his services under Medicaid funds, 42 U.S.C. §1396-1396k, can the mere source of compensation provide the basis for the incursion of federal common law into malpractice litigation surrounding the conferral of private services.

Both the court-appointed counsel and his retained counterpart are, of course, "officers of the court". But, as this Court has pointed out on a number of occasions, the word "officer" as it has always been applied to lawyers conveys quite a different meaning from the word "officer" as applied to people serving as officers within the conventional meaning of that term. *See, e.g., In re Griffiths*, 413 U.S. 717, 728 (1973). Certainly nothing that has been said "in any . . . case decided by this Court places attorneys in the same category as marshals, bailiffs, court clerks or judges." *Cammer v. United States*, 350 U.S. 399, 405 (1956). As Mr. Justice Black noted in *Cammer*, "[u]nlike these officials a lawyer is engaged in a private profession, important though it be to our system of justice." *Id.* They make their own decisions and

follow their own best judgment. In short, "they are not officials of government by virtue of being lawyers." *In re Griffith, supra,* 413 U.S. at 729. The present litigation is simply between private parties.

The Pennsylvania Supreme Court's decision may alternatively be read as requiring resort to federal law, not because of the nature of the defendant, but because of the situs of the tort — in preparation for or in the course of a federal criminal proceeding. Taken on its face, the court's assertion that "we are required to look to the federal law" in determining the immunity of "a participant in a federal legal proceeding" (A. 49) would require application of a federal standard whether the action was commenced against a retained counsel or an appointed one. There is simply no authority for this wide-ranging statement.[15] Where a legal malpractice tort is committed against a citizen of a state, it makes little sense to have the existence of that state's common-law remedy depend upon whether the representation took place in a federal or state forum. If federal common law is to control on the question of immunity, why not as well on the definition of negligence and the measurement of damage?

"The present litigation is purely between private parties and does not touch the rights and duties of the United States." *Bank of America Nat. Trust & Sav. Ass'n v. Parnell,* 352 U.S. 29, 33 (1956). Although funds from the United States Treasury provided defendant Ackerman's compensation, these funds are not placed in jeopardy by the

[15]The instant case, of course, has nothing whatsoever to do with the privilege enjoyed by counsel and witnesses alike against defamation actions for statements made in connection with a judicial proceeding. *See Imbler v. Pachtman,* 424 U.S. 409, 426 n. 23 (1976).

present action. The resolution of petitioner's claim "will have no direct effect upon the United States or its Treasury." *Miree v. DeKalb County,* 433 U.S. 25, 29 (1977). Any interest the federal government may have in the subsequent liability of those whom it compensated, like its interest in the transfer of Government paper in *Parnell,* is far too speculative and far too remote to justify the application of federal law. 352 U.S. at 33-34. The issue whether to displace state law on a matter such as this "is primarily a decision for Congress." *Wallis v. Pan American Petroleum Corp.,* 384 U.S. 63, 68 (1966). In the past, when Congress has seen fit to grant immunity, "it has done so by statute". *Martinez v. Schrock,* 430 U.S. 920 (1977) (White, J., dissenting from denial of certiorari). Petitioner does not dispute Congressional power to extend immunity in a manner consistent with the equal protection mandate of the Fifth Amendment. *See* Point II, *supra.* But Congress has taken no such action here. On the question of immunity, no intent to displace state law is evinced.

"Except in matters governed by the Federal Constitution or by Acts of Congress, the law generally to be applied is the law of the State." *Erie R. Co. v. Tompkins,* 304 U.S. 64, 78 (1938). Although *Clearfield Trust Co. v. United States,* 318 U.S. 363 (1943), identifies a limited area for the operation of federal common law in actions commenced under state law, this is not such a case.

The parallel between the instant action and the one at issue in *Miree v. DeKalb County,* 433 U.S. 25 (1977), is striking. *Miree* arose out of the crash of a private Lear Jet shortly after takeoff from the DeKalb-Peachtree Airport. Plaintiffs, primarily the survivors of the deceased passengers, sought to impose liability on DeKalb County as third-party beneficiaries of contracts between the County and the Federal

Aviation Administration. Under the terms of the federal grant agreement, the County had agreed to take certain safety measures. Plaintiffs contended that such measures had not been effectuated and that such failure had resulted in the air crash. Like the present case, therefore, *Miree* was a state common-law action between private parties. Like the present case, the suit concerned an obligation to plaintiffs undertaken in order to receive federal funds. Like the present case, the litigation raised no question regarding the liability or responsibilities of the United States and could, therefore, have "no direct effect upon the United States or its Treasury". 433 U.S. at 29.

The question posed by *Miree* concerned whether plaintiffs as third-party beneficiaries had standing to sue the County. In a 9-0 decision this Court held federal common law inapplicable. In an opinion joined by all but the Chief Justice, Mr. Justice Rehnquist wrote "[s]ince only the rights of private litigants are at issue here, we find the *Clearfield Trust* rationale inapplicable." *Id.* at 30. The same result should prevail here. Certainly the interests of the United States in regulating aircraft travel and promoting air travel safety, on the one hand, and in promoting an efficent method of representation for defendants in federal criminal prosecutions, on the other, are both significant. But neither interest is threatened by purely private litigation in any but the most speculative, remote manner.

Because, therefore, the representation of Ferri in his criminal trial did not constitute government activity, federal interests are not sufficiently implicated to warrant the application of federal common law on the question of immunity. In any event, as shown below, federal common law accords no immunity to one serving as appointed counsel. *See* Point II, *infra.* The line separating these two

propositions is, at times, blurred. Although the first concerns choice of law and the second, interpretation of federal common law, both lead to the same conclusion. Indeed, in his dissent in the Pennsylvania Supreme Court, Justice Roberts combined the two by concluding that, because they do not act under color of law, court-appointed attorneys do not, as a matter of "federal immunity law . . . acquire status as . . . federal official[s] entitled to immunity" (A. 57).

II.

FEDERAL COMMON LAW AFFORDS NO IMMUNITY TO A PRIVATE ATTORNEY WHOSE APPOINTMENT AND COMPENSATION BY THE FEDERAL GOVERNMENT ARE INTENDED SOLELY FOR THE PRESERVATION OF THE CONSTITUTIONAL RIGHTS OF THE CRIMINAL DEFENDANT.

Recent decisions of this Court have accorded absolute common-law immunity from suits alleging unconstitutional conduct to only two classes of government officials: those performing an adjudicatory role, *see Pierson v. Ray,* 386 U.S. 547 (1967) [state court judges]; *Butz v. Economou,* 438 U.S. ____ , 98 S. Ct. 2894, 2912-2915 (1978) [administrative agency hearing examiners],[16] and those performing a prosecutorial role, *see Imbler v. Pachtman,* 424 U.S. 409 (1976) [state prosecutors]; *Butz v. Economou, supra,* at 2915-2916 [administrative agency

[16]The Court has also noted with approval the analogous grant of absolute immunity to grand jurors. *See Butz v. Economou,* 438 U.S. ____ , 98 S.Ct. 2894, 2912-2913 (1978).

officials performing prosecutorial functions — both those who intitiate the administrative proceedings and those who conduct the trial on behalf of the agency]. For no other official has more than a qualified immunity been found warranted. *See, e.g., Scheuer v. Rhodes,* 416 U.S. 232 (1974) [state governor; state university president; senior officers of the state national guard]; *Wood v. Strickland,* 420 U.S. 308 (1975) [school board members]; *O'Connor v. Donaldson,* 422 U.S. 563 (1975) [superintendent of state hospital]; *Procunier v. Navarette,* 434 U.S. 555 (1978) [state prison administrators]; *Butz v. Economou,* 438 U.S. ____ , 98 S.Ct. 2894 (1978) [Secretary of Agriculture].[17] While these cases usually involve §1983 claims against state officials, this Court has recently evinced a desire for congruity between federal and state officials sued for constitutional infringement of a citizen's rights. *Butz v. Economou, supra,* at 2907-2908.[18] In light of *Butz,* it is now clear that the immunity accorded federal officials may be accurately measured by scrutiny of the prudential considerations outlined in §1983 decisions. *The Supreme Court, 1977 Term,* 92 Harv.L.Rev. 57, 271 (1978); Note, 52 Temp.L.Q. 102, 110-114 (1979).

In his pleading Ferri alleges that, as a consequence of defendant Ackerman's gross neglect and malpractice, he has been deprived of his constitutional rights under the Fifth and Sixth Amendments of the United States Constitution

[17]Although this Court has accorded absolute immunity to persons performing a legislative function, *see, e.g., Lake Country Estates, Inc. v. Tahoe Regional Planning Agency,* ____ U.S. ____ , 99 S.Ct. 1171 (1979), the applicability of such a doctrine to the present case would be patently inappropriate.

[18]Although plaintiff's complaint in *Butz* contained both claims directly under the Constitution and allegations of common-law torts, 98 S.Ct. at 2899 n. 5, the Court addressed only the former. 98 S.Ct. at 2905 n. 22.

(A. 31).[19] Ackerman's defense relies on an absolute federal common-law immunity. As this Court recognized in *Butz,* "federal officials who seek absolute exemption from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope." 98 S.Ct. at 2911. Even assuming that Ackerman can convince this Court of the applicability of federal common law to state litigation between private citizens [*See* Point I, *supra*], it is plain that he cannot, under the recent decisions of this Court, carry the burden imposed upon him by *Butz.* Indeed, quite to the contrary, the grant of absolute immunity to Criminal Justice Act attorneys would engender precisely the internal conflicts which the imposition of immunity typically is designed to avoid and would discourage the very same zealous performance of duty that the grant of such immunity seeks to achieve.

A. There is Neither a Common-Law History of Immunity for Private Counsel nor a Legislative Intent to Grant Such by Virtue of Appointment Under the Criminal Justice Act.

The Pennsylvania Supreme Court extended absolute immunity to federal court-appointed counsel solely by virtue of his participation in judicial proceedings (A. 52). This type of approach, focusing on the location of the officer rather than on the characteristics of his duties, has been

[19]Ferri, however, finds his remedy solely in common-law malpractice and tort. He does not seek a remedy directly under the Constitution nor could he, if, as the lower federal courts have concluded, a court-appointed counsel does not, by virtue of his appointment, act "under color of federal law". *Housand v. Heiman,* ____ F. 2d ____ (2nd Cir. March 20, 1979), slip op. at 1827, 1829 n. 1.

criticized by this Court on more than one occasion as "overly simplistic." *Imbler v. Pachtman,* 424 U.S 409, 421 (1976); *Butz v. Economou,* 438 U.S. ____ , 98 S.Ct. 2894, 2913 (1978). As *Imbler* indicates, the immunity of a federal officer must be "predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." 424 U.S. at 421. The first of these factors is explored below. The second will be dealt with in Point II B, *infra.*

Where this Court has found absolute immunity, it has relied heavily on aged historical foundations. In according such immunity to judges, for example, it has found roots extending back at least four hundred years, *see Floyd v. Barker,* 12 Co.Rep. 23, 77 Eng.Rep. 1305 (K.B. 1608); and given voice by its own decisions for more than one hundred years. *See Bradley v. Fisher,* 80 U.S. (13 Wall.) 335 (1872); *Randall v. Brigham,* 74 U.S. (7 Wall.) 523 (1869). Similarly, in recognizing a like immunity for prosecutors, the Court has been able to cite long-standing common-law precedent. *Griffith v. Slinkard,* 146 Ind. 117, 44 N.E. 1001 (1896); *Yaselli v. Goff,* 12 F.2d 396 (2d Cir. 1926), *aff'd mem.*, 275 U.S. 503 (1927). Even where it has accorded only a qualified immunity, the Court has felt constrained to rely upon ancient common-law origins. *See, e.g., Scheuer v. Rhodes,* 416 U.S. 232, 239-240 n. 4 (1974) [traces immunity of the executive back seven hundred years]; *Butz v. Economou,* 438 U.S. ____ , 98 S.Ct. 2894, 2902 (1978).

There is simply "no history of common-law immunity" for either appointed counsel or public defenders. *Robinson v. Bergstrom,* 579 F.2d 401, 409 (7th Cir. 1978); *Minns v. Paul,* 542 F.2d 899, 901 (4th Cir. 1976), *cert. denied,* 429 U.S. 1102 (1977). Quite to the contrary, the recognition by

numerous federal decisions that a defendant "would arguably have the same state action in tort for malpractice against the public defender [or court-appointed counsel] as a former client might have against a retained attorney" implicitly leads to the conclusion that common law accords no such immunity. *See, e.g., Robinson v. Bergstrom, supra,* 579 F.2d at 411; *Tasby v. Peek,* 396 F.Supp. 952, 958 (W.D. Ark. 1975); *Louisiana ex rel. Purkey v. Ciolino,* 393 F.Supp. 102, 105, 110 (E.D. La. 1975); *Sanchez v. Murphy,* 385 F.Supp. 1362, 1364 (D. Nev. 1974); *Hill v. Lewis,* 361 F.Supp. 813, 818 (E.D. Ark. 1973); *United States ex rel. Wood v. Blacker,* 335 F.Supp. 43, 46 (D. N.J. 1971); *Vance v. Robinson,* 292 F.Supp. 786, 788 (W.D.N.C. 1968).[20] *See also Spring v. Constantino,* 168 Conn. 563, 576, 362 A.2d 871, 879 (1975) [holding unanimously that state public defender enjoys no common-law immunity from state malpractice action]; *Housand v. Heiman,* ____ F.2d ____ (2d Cir. March 20, 1979), slip op. 1827, 1832 [dismissing *Bivens*-type action against federally-appointed counsel for absence of "federal action" but remanding claim under diversity jurisdiction]. *Cf. Walker v. Kruse,* 484 F.2d 802, 804 (7th Cir. 1973) [suggesting that Illinois courts might afford a state law immunity from malpractice liability to counsel appointed to serve *without* compensation].

The federal decisions identify a critical reason for the paucity of common-law history - the obligation of the

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[20]Apparently the only decision to find *common-law* immunity for court-appointed counsel from state malpractice actions is *Sullens v. Carroll,* 446F.2d 1392 (5th Cir. 1971). Note, *Minns v. Paul: Section 1983 Liability of State-Supplied Defense Attorneys,* 63 Va.L.Rev. 607, 620 (1977). The court in *Sullens* based its holding not on historical foundations but on an analogy to other "federal officials".

government to provide counsel for the indigent defendant is of recent vintage.[21] *See Robinson v. Bergstrom, supra,* 579 F.2d at 409; *Minns v. Paul, supra,* 542 F.2d at 901. Yet, as this Court has often recognized, the paucity of common-law history may be remedied by analogizing the functions of the "new office" to those of an office existing at common law. *See Wood v. Strickland,* 420 U.S. 308, 318-319 (1975); *Butz v. Economou,* 438 U.S. ____, 98 S.Ct. 2894, 2913-2916 (1975). The issue for resolution, therefore, narrows here to whether the functions of appointed counsel more closely parallel those of judges and prosecutors[22] - traditionally accorded immunity at common law - or those of private counsel who enjoyed no such immunity. Indeed, common law is replete with instances of clients' actions of malpractice, negligence and breach of contract against their attorneys. *See, e.g., Pitt v. Yaldin,* 4 Burr. 2060,98 Eng.Rep. 74 (K.B. 1767) [for representation in civil matter] *Stephens v. White,* 2 Va. 203 (1796) [civil]; *Eccles v. Stephenson,* 6 Ky. 517 (1814) [civil]; *Hatch v. Lewis,* 175 Eng.Rep. 1145 (N.P. 1861) [criminal]; *Malone v. Sherman,* 49 N.Y.Super. 530 (1883) [criminal]; and *Cleveland v. Cromwell,* 110 App. Div. 82, 96 N.Y.S. 475 (1905) [this case is of particular interest since the complaint therein charged criminal defense counsel with failing to note the running of an applicable statute of limitations].

[21]This historical premise may not be entirely accurate. As noted by the American Bar Association Project on Standards for Criminal Justice in its *Standards Relating to Providing Defense Services* (1968):

> "The concept of providing counsel to those in need of a lawyer in criminal proceedings and unable to retain one is not a novelty in American law. Our courts have undertaken to protect persons accused of crime and lacking legal representation since the earliest periods of our history." *Id.* at 2.

[22]The inappropriateness of such a parallel is explored further in Point II B 2, *infra.*

Merely to pose the question is to suggest the answer. The Criminal Justice Act was enacted in order "to place indigent defendants as nearly as may be on a level of equality with nonindigent defendants in the defense of criminal cases". *United States v. Tate,* 419 F.2d 131, 132 (6th Cir. 1969). It was designed to satisfy the promise of *Johnson v. Zerbst,* 304 U.S. 458 (1938), that no defendant should be forced to stand trial in a federal criminal prosecution without the assistance of counsel. Counsel appointed under the Act owes his primary obligation to the defendant and not to the court or the public at large. His duties, burdens and responsibilities are "exactly the same" as those of private, retained counsel. Burger, *Counsel for the Prosecution and Defense - Their Roles Under the Minimum Standards,* 8 Amer.Crim. Law Q. 1, 6 (1969). This parity between appointed and retained counsel was envisioned by the framers of the Act and has been recognized by all who have scrutinized the relationship. The *Standards Relating to Providing Defense Services* approved by the American Bar Association House of Delegates in February, 1968, set forth the basic principle that defenders and assigned counsel "should be free from political influence and should be subject to judicial supervision only in the same manner and to the same extent as are lawyers in private practice". *Id.* Section 1.4 at 6. As the commentary thereto points out, "[a] system which does not guarantee the integrity of the professional relationship is fundamentally deficient in that it fails to provide counsel who have the same freedom of action as the lawyer whom the person with sufficient means can retain." *Id.* at 19. It is this freedom of action that Congress had in mind when it enacted the Criminal Justice Act. That Act establishes a system of compensating appointed counsel who are independent of

government control, owe their loyalty soley to the client, and are free to perform their functions in as nearly as possible the same manner as if privately retained. Nowhere is this single-mindedness of purpose more starkly revealed than in the initial rejection of the creation of a federal defenders organization [*See* Point I, *supra*].

As Congressman Arch Moore, Jr., the Act's author, noted:

> "Beyond question, the primary objection to the creation of a Federal Public Defender Office is the fear that it will undermine the Anglo-Saxon tradition in America of combative trial proceedings where the lawyer for the defendant is free of State control and thereby free to render the best defense he is capable of making." 110 Cong.Rec. 445 (January 15, 1964).

The sum and substance of the legislative history of the Criminal Justice Act manifest a singular objective: to provide *private* counsel for the indigent who cannot afford to retain one. Congress did not thereby create a new function, it merely made available an already existing one to those without financial means. The duties, responsibilities and burdens of the appointed counsel were designed to mirror in every way those of retained counsel.

It is not likely that Congress enacted the Criminal Justice Act ignorant of the common-law malpractice liability under which lawyers labor. Indeed, the vast majority of the legislators are attorneys themselves. Yet, in spite of this recognition, no suggestion was made on the part of any congressman regarding the need for immunity and the language of the Act is silent on the subject. In *Tenney v. Brandhove,* 341 U.S. 367, 376 (1951), this Court concluded that Congress's silence in §1983 respecting immunity may be properly read as preserving intact the existing

state of affairs under common law. There is no reason to depart from this sound rule of construction in the instant case. Congress acts in the context of existing common-law rules, and in construing a statute a court considers the "common law before the making of the Act." *Heydon's Case,* 3 Co.Rep. 7a, 7b, 76 Eng.Rep. 637, 638 (Ex. 1584) *quoted in Pierson v. Ray,* 386 U.S. 547, 561 (1967) (Douglas, J., dissenting).

B. Consideration of the Interests of the Defendant, the Government and the Appointed Counsel Reveals that All Three Would be Best Served by Permitting Civil Accountability.

The Court's recent immunity cases have attempted to reconcile the dilemma the immunity doctrine poses by balancing the often conflicting interest of "the injured party's legal right to seek redress for the wrong done him" and "the public's interest in fearless decisionmakers free from harassment who are also conscientious and responsible in performing their public duties." *The Supreme Court, 1977 Term,* 92 Harv.L.Rev. 57, 272 n. 45 (1978). A consideration of these interests in the context of the present case not only fails to reveal a conflict between these interests but, in fact, starkly exposes the dangers of immunity to the Sixth Amendment's guarantee of the effective assistance of counsel.

1. The Injured Party's Legal Right to Redress.

As this Court has long recognized, "the right to counsel is the right to the effective assistance of counsel." *McMann v. Richardson,* 397 U.S. 759, 771 n. 14 (1970). The promise of *Johnson v. Zerbst,* 304 U.S. 458 (1938); *Gideon v. Wainwright,* 372 U.S. 335 (1963); and *Argersinger v. Hamlin,* 407 U.S. 25 (1972), means little if it does not mean the right to effective counsel. The duty to assign counsel is not discharged by the mere assignment. *Powell v. Alabama,* 287 U.S. 45, 71 (1932).

In his 1973 John F. Sonnett Memorial Lecture at Fordham Law School, the Chief Justice reminded us that "[t]he high purposes of the Criminal Justice Act will be frustrated unless *qualified* advocates are appointed to represent indigents". Burger, *The Special Skills of Advocacy,* 42 Fordham L.Rev. 227, 230 (1973) (emphasis original). "In some places," reported the Chief Justice, "it is the observation of judges that the Criminal Justice Act has not brought about improvement in the general quality of criminal defense and that performance has not been generally adequate." *Id.* at 237. This case calls on the Court to decide what remedies it will countenance where the gross inadequacy of the performance results in the unwarranted deprivation of human liberty. Shall the consequences of such substandard criminal defense work fall solely on the indigent defendant?

The conduct alleged in the plaintiff's pleadings, if proved, would establish blatant incompetence. No trial tactic, no exercise of discretion, no professional judgment can possibily justify the failure to move to dismiss three counts of an indictment which, on their face, reveal an absolute statute of limitations defense. The error is plain. The prejudice is completely nonspeculative.

Were respondent here retained counsel the remedy at common law would be clear. Solely because Ferri lacked the financial means to retain counsel on his own, however, the decision below would deprive him of an equivalent opportunity to remedy this wrong. [The equal protection implications of such a distinction are treated in Point III, *infra*]. The irony of this dichotomy is that it is the poor who have the greatest need for such a remedy. Quite aside from the generally lower quality (or motivation) of appointed counsel, *see* Note, *Providing Counsel for the Indigent Accused: The Criminal Justice Act,* 12 Amer.Crim. L.Rev. 789,821 (1975); Bazelon, *The Defective Assistance of Counsel,* 42 U.Cinn. L.Rev. 1 (1973), the client with such counsel can exercise none of the traditional quality controls enjoyed by one who can afford retained counsel. The Criminal Justice Act plans generally deny the right to select counsel of one's own choosing. *See, e.g.,* Western District of Pennsylvania Criminal Justice Act Plan, Section V A(3). The right to seek removal and substitution of counsel perceived as incompetent is severely restricted. *See, e.g., United States v. Michelson,* 559 F.2d 567, 572 (9th Cir. 1977); *United States v. Malizia,* 437 F.Supp. 952, 955 (S.D.N.Y. 1977), *aff'd. mem.,* 573 F.2d 1298 (2d Cir. 1978). The client with appointed counsel lacks even the comfort of knowing that counsel is being assisted or supervised by a superior as may be the case where a public defender is employed.

That a habeas corpus remedy may lie for the ineffective assistance of counsel is no basis for affording malpractice immunity. Even assuming that the malpractice is one of constitutional dimension, habeas corpus is not an adequate remedy. The relief it offers is solely prospective in nature. A proper system of remedies should provide redress to injured parties by compensating them for losses suffered, it should

provide sanctions against the party responsible for the injury and it should deter others similarly situated from repeating the conduct which led to the injury. Measured by these goals, habeas corpus is probably the least practical means of dealing with ineffective assistance of counsel. Bines, *Remedying Ineffective Representation in Criminal Cases: Departures From Habeas Corpus,* 59 Va.L.Rev. 927, 970-971 (1973). It compensates no one; it delivers no sanctions against the source of the problem; and its deterrent effect on defense counsel is virtually non-existent. Ironically, habeas corpus holds only the government accountable even though its control over the unconstitutional conduct is ever so slight. *Id.*[23]

The remedies of reprimand, censure, suspension and disbarment of negligent lawyers are similarly unavailing. Judges and prosecutors rarely initiate them and the poorly represented defendant, for whom these remedies provide no compensation, has little incentive to seek such sanctions against his former counsel. Bines, *supra,* at 972-973.

In short, it is the malpractice action which affords the only viable remedy. *See Link v. Wabash R.Co.,* 370 U.S. 626, 634 n. 10 (1962) [". . . if an attorney's conduct falls substantially below what is reasonable under the circumstances, the client's remedy is against the attorney in a suit for malpractice".] It alone can compensate the criminal

[23]The availability of habeas corpus for ineffective assistance of counsel is at best speculative. Courts are most hesitant to allow such claims to become opportunities for relitigating questions disposed of on direct appeal or raising underlying issues not cognizable on habeas review. *See, e.g., Beasley v. United States,* 491 F. 2d 687, 690 (6th Cir. 1974). Moreover, the prisoner who seeks habeas corpus and loses may find his negligence action dismissed as collaterally estopped. *See Lamore v. Laughlin,* 159 F.2d 463 (D.C. Cir. 1947).

defendant for his unlawful conviction and imprisonment. It alone can provide such compensation at the expense of the party most responsible for whatever injustice has occurred. Finally, it alone can effectively deter undesirable future conduct and encourage strict adherence to the Code of Professional Responsibility and traditional standards of adequate defense representation.

2. The Public's Interest in Zealous Advocates Who Conscientiously and Responsibly Perform Their Public Duties.

As this Court has so frequently recognized, immunity is not granted for the benefit of the erring official. It is, instead, intended solely "for the benefit of the public whose interest it is that the [officials] should be at liberty to exercise their functions with independence and without fear of consequences." *Scott v. Stansfield,* L.R. 3 Ex. 220,223 (1868), *quoted in Pierson v. Ray,* 386 U.S. 547,554 (1967). *See Gregoire v. Biddle,* 177 F.2d 579,581 (2d Cir. 1949), *cert. denied,* 339 U.S. 949 (1950). Yet the public interest that prompts the grant of absolute immunity to judges and prosecutors is non-existent where court-appointed counsel are involved. *See Spring v. Constantino,* 168 Conn. 563, 566-567, 362 A.2d 871, 875 (1975); *Barto v. Felix,* 378 A.2d 927,931 (Pa. Super. 1977). A prosecutor or judge owes his primary duty of allegiance to the general public. In the course of that duty he is commanded to seek sanctions against or punish unwilling defendants. Although it is recognized that there will be an occasional prosecutor or judge who will act erroneously, maliciously or even corruptly, it has been thought better in the long run to leave

unredressed these wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. *Gregoire v. Biddle, supra,* 177 F.2d at 581. To guarantee that their loyalties are not divided between the imposed duty to the public to insure justice and the natural instinct to protect oneself from suit, absolute immunity is afforded to judges, *Stump v. Sparkman,* 435 U.S. 349 91978); *Pierson v. Ray,* 386 U.S. 547 (1967), and prosecutors, *Imbler v. Pachtman,* 424 U.S. 409 (1976). The key concern in these decisions has been the tension or conflict that exists between the public need and the fear of suit.

An appointed counsel, on the other hand, is not a servant of the public. His duty is undivided, whether measured by the Code of Professional Responsibility [E.C. 5-1 provides that the professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client], the ABA Standards Relating to The Defense Function [§1.6 is entitled "Clients Interests Paramount"], or the Criminal Justice Act [*See, e.g.,* Section V E(7) of the Western District Plan]. He serves only the client for whose representation he has been appointed. It is difficult to see, therefore, how potential liability for failing to provide a competent defense divides a lawyer's loyalties between himself and the person he is supposed to defend. As one commentator has noted, "If anything potential liability should promote greater devotion to the clients' cause, at least if the experience of a hundred odd years of tort liability for professional malpractice has not been wrong." Bines, *supra,* 59 Va.L.Rev. at 980 n. 235. Certainly, the argument of divided loyalty has never successfully been interposed as a defense by physicians in such civil malpractice actions. It would indeed be ironic if we were to grant counsel an

immunity from suit by the sole person to whom a duty is owed.

Far from preventing the spectre of competing loyalties, the grant of immunity here would actually create such conflict. An appointed counsel stands unique among the categories of officials treated by this Court in its immunity cases. At the very same time that he is representing the indigent pursuant to his appointment, he is maintaining a private practice. [Compare the situation of the Federal Public Defender who is prohibited from engaging in the private practice of law, *see* 18 U.S.C. §3006A(h)(2)(A); Western District Plan, Section II C(7)]. His private practice, of course, is potentially a source of a common-law malpractice action. There has always been the concern that "the busy lawyer" who receives an appointment will render a perfunctory service at best. *See* ABA *Standards Relating to Providing Defense Services,* at 25 (1968). The pay is seldom competitive and the clients are seldom a source of future business. How much more serious is this concern, however, where only the paying portion of his practice may subject the attorney to malpractice liability. It calls for little speculation to predict that a lawyer, hard pressed for time, will be likely to devote an inappropriate percentage of his energies to the portion of his practice which carries with it the possibility of liability for substandard work. The statutory duty to the indigent is here at odds with the natural instinct to protect onself from suit. Ironically, therefore, the very tension which the grant of immunity to judges and prosecutors was adopted to alleviate would instead be promoted by a similar grant of immunity to a court-appointed counsel. The grave danger that affording such immunity would prompt counsel to neglect his appointed clients in favor of his retained ones is reason enough to deny it.

A number of lower court decisions have expressed concern about two additional problems allegedly posed by potential liability: (1) that the spectre of such liability will make it difficult to recruit able attorneys to take appointments, *see Minns v. Paul,* 542 F.2d 899, 901 (4th Cir. 1976), *cert. denied,* 429 U.S. 1102 (1977); and (2) that the fear of suit will prompt appointees to press frivolous claims for their clients. *See Robinson v. Bergstrom,* 579 F.2d 401, 409 (7th Cir. 1978).[24] Neither concern withstands scrutiny.

The argument that there are not enough able lawyers willing to take on appointments that subject them to potential malpractice liability ignores several critical considerations. Private attorneys are already subject to suit by their retained clients. Accordingly, many already have liability insurance for protection. There is no reason to believe that such policies would not equally cover suits by non-paying clients. Indeed, it would not be surprising to find that many of the appointed counsel sued to date were represented in such actions by counsel provided by their insurer.

Attorneys are certain to continue to be available for appointment so long as representation is compensated. While the current rates of compensation, $30 per hour for court time and $20 per hour for preparation time (18 U.S.C. §3006A(d)(1)), may not always be competitive, they are certainly adequate to attract many of the burgeoning numbers of law school graduates. *Cf. Argersinger v. Hamlin,* 407 U.S. 25, 37 n. 7 (1972) ["Indeed, there are 18,000 new admissions to the bar each year - 3,500 more lawyers than are required to fill the 'estimated 14,500 average annual openings' "]. The fear that these rates will not attract

[24]Both *Minns* and *Robinson* considered these concerns in the context of potential §1983 liability and not under common-law suits.

"competent counsel" if potential liability accompanies appointment is equally unsound.[25] In the Southern District of New York, for example, where a stringent certification process was undertaken to select adequate counsel for criminal defendants, competition for assignments has been rigorous. *See* Burger, *The Special Skills of Advocacy,* 42 Fordham L.Rev. 227, 239 n. 24 (1973). As in *Argersinger,* therefore, the argument that a lack of available lawyers militates against the protection of a criminal defendant's constitutional rights is factually incorrect. *See Scott v. Illinois,* ____ U.S. ____, 99 S.Ct. 1158, 1162 (1979).

The argument that the threat of possible suit by clients will prompt appointed counsel to press frivolous claims is similarly unavailing. The ABA Code of Professional Responsibility is equally binding on retained and appointed counsel, and there is no reason to believe that an attorney who refuses to press frivolous claims for his paying clients will do otherwise for his indigent ones. *See* E.C. 7-4: "A lawyer is not justified in asserting a position in litigation that is frivolous." If anything, the impetus is greater in the former situation where no maximum compensation is set by law. *Cf.* 18 U.S.C. §3006A (d)(2) [compensation shall not exceed $1000 for each attorney in a felony case]. While it may be true that, since he does not pay for counsel's services, the indigent may be less deterred from pressing his attorney to present frivolous claims (although his position seems little different from the private client who frequently pays for

[25]Even if factually accurate the argument proves nothing. At present, less than 3¢ of the federal judicial dollar is utilized for compensating appointed counsel. *See* 1977 Annual Report of the Director of the Administrative Office of the United States Courts 50, Appx. II. That this financial commitment may be inadequate to attract able lawyers is hardly justification for immunizing incompetence.

criminal defense work under an agreed-in-advance set fee rather than an hourly rate), it is equally true that the attorney, bound, absent unusual circumstances, to (d)(2)'s maximum compensatory limits, is less likely to accede to the requests. The speculative possibility of having to defend, at some unknown time in the future, a suit charging failure to pursue a frivolous claim, is hardly likely to prompt the immediate expenditure of uncompensated time in the mere hope of discouraging such a liability action.[26] Realistically, therefore, potential liability is unlikely to induce appointed counsel to do too much. Far more serious is the possibility that immunity, in conjunction with the ceilings on compensation, will prompt him to do too little.

For all of the foregoing reasons, the creation of immunity would pose a danger to the government's interest, manifested by the passage of the Criminal Justice Act, in delivering equal justice to the poor. As important as justice, however, is the appearance of justice. The American Bar Association has long recognized the need to "remove any basis for an implication that defense attorneys under the [appointed] system are in any way subject to the control of those who appear as their adversaries or before whom they must appear." ABA *Standards Relating to Providing Defense Services* 21 (1968). Equally significant is the need to remove any implication that such attorneys carry fewer responsibilities, duties or burdens than their retained counterparts. Selective grants of immunity dependent upon the source of compensation achieve nothing in this direction. Inequalities

[26]The fact that compensation under the Criminal Justice Act is usually set by the judge before whom the case was tried, 18 U.S.C. §3006A(d)-(4), operates as a further constraint on the overzealousness of appointed counsel.

of this nature "are quickly perceived by those who are being provided representation and may encourage cynicism toward the justness of the legal system and, ultimately, of society itself." *Id.* at 19. If the incompetency level of appointed counsel is as great as some have perceived, *see* Bazelon, *The Defective Assistance of Counsel,* 42 U.Cinn.L.Rev. 1 (1973), it hardly seems worthy of the legal profession's integrity to build a wall of immunity around it.

3. The Interest of Appointed Counsel.

Barr v. Matteo, 360 U.S. 564, 565 (1959), recognizes only "two considerations" of high importance in defining the nature and scope of immunity: on the one hand, the protection of the individual citizen against pecuniary damage; and on the other, the protection of the public interest. That no attention was paid to the plight of the particular officer, except insofar as it affected the performance of his public duties, is not surprising. In the context of a public officer whose duties are owed only to the public, the interests of the officer and the public are synonymous. Where, as here, the duty imposed is one to the client, it similarly cannot be contended that the interest of the attorney presents a third factor for consideration. The professional judgment of a lawyer must be exercised, within the bounds of the law, "solely for the benefit of his client and free of compromising influences and loyalties." ABA *Code of Professional Responsibility* E.C. 5-1.

The duty of an attorney to his client has long been considered jeopardized by an absence of accountability. Accordingly, while a lawyer may insure himself against malpractice, he may not "attempt to exonerate himself from

or limit his liability to his client for his personal malpractice." ABA *Code of Professional Responsibility* D.R. 6-102. As the Code appropriately recognizes:

> "A lawyer who handles the affairs of his client properly has no need to attempt to limit his liability for his professional activities and one who does not handle the affairs of his client properly should not be permitted to do so." ABA *Code of Professional Responsibility* E.C. 6-6.

Quite clearly the Bar has never believed that the spectre of potential liability discourages professional discretion in the discharge of a lawyer's duties.[27] Indeed, E.C. 6-6 is immediately followed by Canon 7 requiring a lawyer to represent his client zealously within the bounds of the law. There is nothing inconsistent in these commands. To the contrary, they enforce the notion that the attorney's and client's interests, within the bounds of the law, are identical.

In medical malpractice cases the courts have never recognized the claim that zealous and fearless protection of a patient's health requires freedom from accountability by civil suit. The interest of physician and patient in the treatment of the latter has instead been handled as congruous. The mere fact that the source of the physician's compensation may have been government Medicaid funds has never called for a different rule.[28] To treat the legal profession otherwise would be neither prudentially desirable nor rationally defensible.

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[27]In any event, what took place in the instant case cannot be deemed an exercise of professional discretion even by the most liberal interpretation of that term.

[28]Compare Congressional treatment of Armed Forces medical personnel, 10 U.S.C. §1089 (1977) [an action against the United States is the sole remedy for injuries resulting from the negligent or wrongful acts or omissions of such medical personnel].

III.

AFFORDING A FEDERAL COMMON-LAW IMMUNITY TO ATTORNEYS APPOINTED TO REPRESENT INDIGENTS WHERE NO SUCH IMMUNITY IS AFFORDED RETAINED COUNSEL WOULD CONSTITUTE A CLASSIFICATION BASED SOLELY ON WEALTH PROHIBITED BY THE EQUAL PROTECTION COMPONENT OF THE FIFTH AMENDMENT.[29]

In formulating or enforcing the common law, courts are bound by the restrictions imposed by the Constitution. *See Erie R. Co. v. Tompkins,* 304 U.S. 64 (1938); *Shelley v. Kraemer,* 334 U.S. 1, 17-18 (1948). One of the most fundamental of those restrictions is that no person may be denied the equal protection of the laws. That the "law" under consideration may be judicially composed rather than legislatively conceived is no justification for different standards. *See Shelley v. Kraemer, supra.*

American common law has never accorded immunity to retained criminal defense counsel. *See, e.g., Lamore v. Laughlin,* 159 F.2d 463 (D.C. Cir. 1947) [*Compare* the current English system which immunizes barristers but not solicitors. *Rondel v. Worsley,* 1 A.C. 191 (H.L. 1969)]. The creation and application of a different rule for those paid to represent indigent criminal defendants would result in the denial, solely on the basis of poverty, of two inherently

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[29]This equal protection argument was raised below (A. 31), implicitly rejected by the majority (*see* dissent of Roberts, J. at A. 57) and is well within the confines of the issue on which certiorari was granted. *See also* Petition for Certiorari at 6.

fundamental rights: the right to the effective assistance of counsel and the right of access to the courts. *See* dissent of Roberts, J. below (A. 57). The first of these is prophylactic. The second is compensatory.

A. The Grant of Absolute Immunity Establishes a Lower Standard of Care For Appointed Counsel Than for Retained Counsel.

"There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Griffin v. Illinois,* 351 U.S. 12, 19 (1956). There is little that is more critical in this respect than the right to the assistance of counsel. *Gideon v. Wainwright,* 372 U.S. 335 (1963). The mere appointment of counsel does not alone suffice. The circumstances of the appointment may be as important as the assignment itself, *Powell v. Alabama,* 287 U.S. 45,71 (1932), for the right to counsel means nothing if it does not mean the right to effective counsel. *McMann v. Richardson,* 397 U.S. 759, 771 n. 14 (1970). Too many important constitutional rights may be lost by the actions of one's attorney to demand anything but an uncompromising, competent lawyer with undivided loyalty to his client. Anything less simply cannot comport with the requirements of the Sixth Amendment.

An individual with financial means can hire counsel of his choosing, substitute new counsel if he is dissatisfied and sue him if his incompetence causes loss of property or liberty. The Criminal Justice Act denies the indigent the first of these, severely limits the opportunity for the second and now it would seem, if the lower court is to prevail, the third shall be lost as well. A counsel without accountability poses far greater dangers of ineffectiveness. It is just such a concern

that prompted D.R. 6-102 of the ABA Code of Professional Responsibility, prohibiting retained counsel from entering into a contractual arrangement with his client "to exonerate himself from or limit his liability to his client for his personal malpractice." To allow a different situation to prevail with appointed counsel would constitute a denial of equal protection. That immunity in the latter situation would be imposed by common law while the Code's prohibition is solely against client-granted immunity hardly provides a rational distinction.

Certainly this differential treatment could not be what the Criminal Justice Act Plan of the Western District intended when it provided in Section V E(7):

> "Attorneys appointed pursuant to any provision of this Plan shall conform to the highest standards of professional conduct, including but not limited to the provisions of the American Bar Association's draft code of Professional Responsibility."

Neither does it seem that this is what the Chief Justice had in mind when he wrote that appointed counsel have "exactly the same duties *and burdens* and responsibiliies as the highly paid, paid-in-advance criminal defense lawyer." Burger, *Counsel for the Prosecution and Defense - Their Roles Under the Minimum Standards,* 8 Amer.Crim. Law Q. 1, 6 (1969) [emphasis supplied]. No burden would seem more significant than being held accountable for one's omissions and commissions.

It is, of course, fair to presume that many, if not most, appointed counsel carry out their court-ordered responsibilities as they would their regular practice despite the differential in pay. That they would continue to do so were absolute immunity conferred cannot, however, be similarly

presumed.[30] The complete loss of accountability is bound to take its toll. A habeas corpus petition alleging ineffective assistance of counsel, even if granted, imposes no sanctions. Disciplinary proceedings are infrequent and generally ineffective as a deterrent to others. The prophylactic need for potential liability therefore is essential. As Professor Tribe has recognized, lawyers are "likely to be somewhat more obtuse to the merits of indigents' claims than to those of nonindigents." L. Tribe, *American Constitutional Law* §16-36 at 1105 (1978). Counsel for indigents generally need an "extra push" in order to ensure that they pursue their clients' interests as zealously as would retained counsel. *Id. See also Anders v. California,* 386 U.S. 738 (1967). The need for an "extra push" here is concededly not constitutionally compelled. To fail to provide the *same* push that is experienced by retained counsel would, however, contravene the requirements of equal protection.

B. The Right to Compensatory Relief For the Deprivation of Liberty Suffered as a Consequence of Incompetent Counsel Cannot Be Made To Depend Solely on the Financial Status of the Injured Party.

A government cannot deny access, simply because of one's poverty, to a "judicial proceeding [that is] the only effective means of resolving the dispute at hand." *Boddie v. Connecticut,* 401 U.S. 371, 376 (1971). Yet that is exactly what would transpire if the absolute immunity sought by

[30]This is especially so where the attorney would, as here, remain liable in malpractice on the "private" side of his practice. *See* Point II B 2, *supra.*

Ackerman were to be granted. Far more is involved here than the mere existence of a small filing fee. *Cf. United States v. Kras,* 409 U.S. 434 (1973); *Ortwein v. Schwab,* 410 U.S. 656 (1973). More indeed is involved than even the substantial impediments to court access struck down by this Court in *Bounds v. Smith,* 430 U.S. 817 (1977) [state's failure to provide prison legal research facilities] and *Johnson v. Avery,* 393 U.S. 483 (1969) [prison regulations prohibiting inmates from assisting other prisoners in preparation of legal papers]. In short, we deal here with a total closing of the courtroom door.

There is, of course, no more a constitutional right to sue for malpractice than there is to sue for wrongful death. Once such an action has been accorded by statute or common law, however, "it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause." *Lindsey v. Normet,* 405 U.S. 56,77 (1972). *See also Levy v. Louisiana,* 391 U.S. 68 (1968); *Glona v. American Guarantee Co.,* 391 U.S. 73 (1968). Such a denial is all the more offensive when no alternative remedy is available.

Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty," *Bivens v. Six Unknown Federal Narcotics Agents,* 403 U.S. 388, 395 (1971). A defendant who has lost his liberty by virtue of his appointed counsel's incompetence often has no other remedy. A habeas corpus petition is merely prospective in nature and provides no compensatory relief. No action lies against the Government under the Federal Tort Claims Act. *Jones v. Hadican,* 552 F.2d 249, 251 n. 4 (8th Cir.), *cert. denied,* 431 U.S. 941 (1977). *Cf.* 10 U.S.C. §1089 (1977). [creating an exclusive action against the United States for the negligence of Armed Forces medical

personnel]. Finally, no action would lie directly under the United States Constitution. *Housand v. Heiman*, ____ F.2d ____ (2d Cir. March 20, 1979), slip op. 1827 1829 n.1 [Criminal Justice Act lawyer does not act under color of federal law].

Absolute immunity deprives an indigent of the only "effective means" of recovering for liberty lost by virtue of incompetent counsel. In contrast, the person with means to retain counsel is permitted free access to the courts for the identical injury. Assuredly, such classification requires some assertion of a compelling or at least significant governmental reason.[31] Yet not even a rational basis justifying this distinction appears evident.

C. No Rational Basis Exists For Having The Grant of Immunity to Defense Counsel Depend Upon the Source of Compensation.

A retained defense counsel in a federal criminal prosecution may be sued in a subsequent state common-law action for malpractice committed in preparing and conducting the defense. No legitimate reason exists for treating appointed counsel differently. All of the arguments that have been pressed for the grant of absolute immunity apply with equal force to retained counsel. He is similarly a part of the

[31]Because no statute is being assailed here, the concomitant need for deference to the legislative process is absent. The traditional reluctance to interfere with the choices made by the people's representatives has no place where common-law doctrines are the subject of attack. Accordingly, the powerful presumption of validity prompted by this deferential attitude to the majoritarian ideal dissipates when it is judicially composed doctrines that are being scrutinized.

"judicial process," a participant in a federal criminal prosecution, and an "officer of the court." He certainly has no less of a need to exercise his "full professionalism." In *Minns v. Paul*, 542 F.2d 899 (4th Cir. 1976), the court wrote of the need for "unfettered discretion. . .to decline to press the frivolous, to assign priorities between indigent litigants, and to make strategic decisions with regard to a single litigant as to how best his interests may be advanced." *Id.* at 901. The importance of identifying and discarding claims without merit; of dividing time between clients; and of deciding how best to protect an individual client's interest is not limited to the representation of indigents. All lawyers confront the same difficulties. All face the same ethical dilemmas. All are forced to deal with the same problems of judgment.

Minns, supra, also suggested as justification the need to recruit and hold able lawyers to represent indigents. Even if it were true that the potential liability would "scare away" some competent attorneys,[32] it seems far more likely that it would be the incompetent ones who would be prompted to avoid appointed cases. If lawyers know they can be sued, they will not take on cases they know they are not qualified to handle. In any event, the grant of immunity in this selective manner is not a rational means to encourage the increased participation of competent counsel. By creating, in the appointed counsel, a person with potential liability in only a portion of his practice, the grant of immunity poses far greater danger to the level of representation under the Criminal Justice Act than is posed by the speculative "scaring off" of a small number of able attorneys. Without immunity those who do seek appointments are likely to be

[32]*See* Point II B 2, *supra* for further treatment of this contention.

zealous advocates. With it, the appointees will all too frequently neglect that portion of their practice that holds them unaccountable. Any minimal increase in numbers, therefore, will be far offset by the decline in quality of participation.

If the Criminal Justice Act is unable to attract a sufficient number of able attorneys (and, at least in the Southern District of New York, this does not seem to be the case, *see* Burger, *The Special Skills of Advocacy,* 42 Fordham L.Rev. 227, 239 n. 24 (1973)) immunity from liability for incompetent conduct is, at best, an irrational means to remedy the problem.[33]

When the articulated justifications are swept aside as facade, all that remains is a fear that the indigent will be more litigious and more likely to press frivolous claims. Presumably such a rationale would also justify minimum income levels for the filing of §1983 claims. Our Constitution prohibits such invidious generalizations, *see James v. Strange,* 407 U.S. 128 (1972); *Lindsey v. Normet,* 405 U.S. 56 (1972), and this Court, as the ultimate defender of the Constitution, ought not allow them to serve as the basis for a discriminatory common-law doctrine of immunity.

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[33]Among the rational approaches to dealing with a low level of participation by the bar are reasonable rates of compensation, ABA *Standards Relating to Providing Defense Services,* at 30 (1968) and enforcing mandatory participation by members of the bar. Note, *Providing Counsel for the Indigent-Accused: The Criminal Justice Act,* 12 Amer. Crim. L. Rev. 789, 813 (1975). *See also United States v. Dillon,* 346 F.2d 633, 635 (9th Cir. 1965), *cert. denied,* 382 U.S. 978 (1966) [representation of indigents described as "a condition under which lawyers are licensed to practice as officers of the court"].

CONCLUSION

The judgment of the Pennsylvania Supreme Court should be reversed and the case remanded.

Respectfully submitted,

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May 1979

APPENDIX A

The Criminal Justice Act, 18 U.S.C. §3006A, in pertinent part provides:

§3006A. Adequate representation of defendants

(a) Choice of plan. - Each United States district court, with the approval of the judicial council of the circuit, shall place in operation throughout the district a plan for furnishing representation for any person financially unable to obtain adequate representation (1) who is charged with a felony or misdemeanor (other than a petty offense as defined in section 1 of this title) or with juvenile delinquency by the commission of an act which, if committed by an adult, would be such a felony or misdemeanor or with a violation of probation, (2) who is under arrest, when such representation is required by law, (3) who is subject to revocation of parole, in custody as a material witness, or seeking collateral relief, as provided in subsection (g), or, (4) for whom the Sixth Amendment to the Constitution requires the appointment of counsel or for whom in a case in which he faces loss of liberty, any Federal law requires the appointment of counsel. Representation under each plan shall include counsel and investigative, expert, and other services necessary for an adequate defense. Each plan shall include a provision for private attorneys. The plan may include, in addition to a provision for private attorneys in a substantial proportion of cases, either of the following or both:

(1) attorneys furnished by a bar association or a legal aid agency; or

(2) attorneys furnished by a defender organization, established in accordance with the provisions of subsection (h).

Prior to approving the plan for district, the judicial council of the circuit shall supplement the plan with provisions for representation on appeal. The district court may modify the plan at any time with the approval of the judicial council of the circuit. It shall modify the plan when directed by the judicial council of the circuit. The district court shall notify the Administrative Office of the United States Courts of any modification of its plan.

(b) Appointment of counsel. - Counsel furnishing representation under the plan shall be selected from a panel of attorneys designated or approved by the court, or from a bar association, legal aid agency, or defender organization furnishing representation pursuant to the plan. In every criminal case in which the defendant is charged with a felony or a misdemeanor (other than a petty offense as defined in section 1 of this title) or with juvenile delinquency by the commission of an act which if committed by an adult, would be such a felony or misdemeanor or with a violation of probation and appears without counsel, the United States magistrate or the court shall advise the defendant that he has the right to be represented by counsel and that counsel will be appointed to represent him if he is financially unable to obtain counsel. Unless the defendant waives representation by counsel, the United States magistrate or the court, if satisfied after appropriate inquiry that the defendant is financially unable to obtain counsel, shall appoint counsel to represent him. Such appointment may be made retroactive to include any representation furnished pursuant to the plan prior to appointment. The United States magistrate or the court shall appoint separate counsel for defendants having interests that cannot properly be represented by the same counsel, or when other good cause is shown.

(c) Duration and substitution of appointments. - A person

for whom counsel is appointed shall be represented at every stage of the proceedings from his initial appearance before the United States magistrate or the court through appeal, including ancillary matters appropriate to the proceedings. If at any time after the appointment of counsel the United States magistrate or the court finds that the person is financially able to obtain counsel or to make partial payment for the representation it may terminate the appointment of counsel or authorize payment as provided in subsection (f), as the interests of justice may dictate. If at any stage of the proceedings, including an appeal, the United States magistrate or the court finds that the person is financially unable to pay counsel whom he had retained, it may appoint counsel as provided in subsection (b) and authorize payment as provided in subsection (d), as the interests of justice may dictate. The United States magistrate or the court may, in the interests of justice, substitute one appointed counsel for another at any stage of the proceedings.

(d) Payment for representation. -

(l) Hourly rate. - Any attorney appointed pursuant to this section or a bar association or legal aid agency or community defender organization which has provided the appointed attorney shall, at the conclusion of the representation or any segment thereof, be compensated at a rate not exceeding $30 per hour for time expended in court or before a United States magistrate and $20 per hour for time reasonably expended out of court, or such other hourly rate, fixed by the Judicial Council of the Circuit, not to exceed the minimum hourly scale established by a bar association for similar services rendered in the district. Such attorney shall be reimbursed for expenses reasonably incurred, including the costs of transcripts authorized by the United States magistrate or the court.

(2) Maximum amounts. - For representation of a defendant before the United States magistrate or the district court, or both, the compensation to be paid to an attorney or to a bar association or legal aid agency or community defender organization shall not exceed $1,000 for each attorney in a case in which one or more felonies are charged, and $400 for each attorney in a case in which only misdemeanors are charged. For representation of a defendant in an appellate court, the compensation to be paid to an attorney or to a bar association or legal aid agency or community defender organization shall not exceed $1,000 for each attorney in each court. For representation in connection with a post-trial motion made after the entry of judgment or in a probation revocation proceeding or for representation provided under subsection (g) the compensation shall not exceed $250 for each attorney in each proceeding in each court.

(3) Waiving maximum amounts. - Payment in excess of any maximum amount provided in paragraph (2) of this subsection may be made for extended or complex representation whenever the court in which the representation was rendered, or the United States magistrate if the representation was furnished exclusively before him certifies that the amount of the excess payment is necessary to provide fair compensation and the payment is approved by the chief judge of the circuit.

(4) Filing claims. - A separate claim for compensation and reimbursement shall be made to the district court for representation before the United States magistrate and the court, and to each appellate court before which the attorney represented the defendant. Each claim shall be supported by a sworn written statement specifying the time expended, services rendered, and expenses incurred while the case was

pending before the United States magistrate and the court, and the compensation and reimbursement applied for or received in the same case from any other source. The court shall fix the compensation and reimbursement to be paid to the attorney or the bar association or legal aid agency or community defender organization which provided the appointed attorney. In cases where representation is furnished exclusively before a United States magistrate, the claim shall be submitted to him and he shall fix the compensation and reimbursement to be paid. In cases where representation is furnished other than before the United States magistrate the district court, or an appellate court, claims shall be submitted to the district court which shall fix the compensation and reimbursement to be paid.

The Criminal Justice Act Plan of the Western District of Pennsylvania provides, in pertinent part:

* * *

II. SOURCES OF REPRESENTATION

A. *Panel of Attorneys*

(1) The bar associations of the several counties within the district have prepared and certified to this Court a list of attorneys who, in the opinion of each certifying bar association, are competent to give adequate representation to parties under the Act, and who are willing to serve. The Court has on the basis of such lists and its own inquiry, established and approved a panel of attorneys. The Court ratifies such existing panel and such existing procedures.

(2) Additions to and deletions from the panel of attorneys will be made periodically by the Court, so that

there shall be sufficient names on the list to provide adequate representation to persons financially unable to obtain adequate representation, and to distribute the work fairly among the members of the Bar. In making such additions and deletions, the Court shall not be limited to the lists furnished by the several bar associations.

* * *

C. *Federal Public Defender Organization*

(1) In addition to the use of private attorneys, the Court has determined that the use of a Federal Public Defender Oganization as defined in 18 U.S.C. 3006A(h) (2) will facilitate the representation of persons entitled to the appointment of counsel under the Criminal Justice Act and that the Western District of Pennsylvania is a district in which at least two hundred persons annually required the appointment of counsel pursuant to 18 U.S.C. 3006(h) (1).

* * *

(7) Neither the Federal Public Defender nor any staff attorney appointed by him may engage in the private practice of law.

* * *

III. DETERMINATION OF NEED FOR COUNSEL

B. *Counsel for Person Arrested when Representation is Required by Law.*

(1) Where a person arrested has been represented by counsel before his presentation before a judicial officer under circumstances where such representation is required by law, his counsel may subsequently apply to

the court for approval of compensation. If the court finds such person has been and is then financially unable to obtain adequate defense, that his counsel is on the panel of attorneys approved by the court, and that such representation was required by law, compensation will be made retroactive to cover out-of-court time expended by the attorney during the arrest period, and in addition cover compensation for services rendered from the time of his initial presentation before a magistrate, or the court, as the case may be.

(2) The court or the magistrate may make retroactive appointment of counsel where such attorney is on the panel of attorneys approved by the court and will continue to represent such party in subsequent proceedings before this court.

* * *

V. APPOINTMENT OF COUNSEL

A. *By the Court or the Magistrate*

(1) Unless the defendant waives representation of counsel, the court or the magistrate, if satisfied after appropriate inquiry in accordance with Subtitles A, B, C and D of Title III, that the defendant is financially unable to obtain counsel, shall appoint counsel to represent him.

* * *

(3) No such defendant shall have the right to select his appointed counsel from the list of attorneys, Federal Public Defender Organization, or otherwise.

(4) The court or the magistrate shall in appointing such counsel use the list of attorneys approved by the court or the Federal Public Defender Organization, except in

extraordinary circumstances where it becomes necessary to make another selection of a member of the bar of this Court.

* * *

B. *Ratio of Appointments*

The judge or magistrate will determine whether any party entitled to representation will be represented by a private attorney on the approved panel of attorneys or by the Federal Public Defender Organizations. However, insofar as practicable, private attorney appointments will be made in at least twenty-five percent of the cases.

* * *

E. *Duties of Appointed Counsel and Defendant*

(1) Counsel appointed by a judge or magistrate shall, unless excused by order of court, continue to act for the party throughout the proceedings in this court.
(2) If requested to do so by the party whom he represents, counsel appointed under this Plan shall file a timely Notice of Appeal, and his appointment shall continue on appeal unless, or until, he is relieved by the Court of Appeals.
(3) It shall be the duty of counsel, appointed under this Plan, to represent a defendant incarcerated at the time of his appointment to consult with the defendant at his place of incarceration as promptly as possible, and not later than three days from the date of the mailing of the order of appointment.
(4) No appointed counsel may request or accept any payment or promise of payment for assisting in the

representation of a defendant, unless such payment is approved by order of court.
(5) If at any time after his appointment counsel should have reason to believe that a party is financially able to obtain counsel or to make partial payment for counsel, he shall advise the court.
(6) It shall be the duty of any defendant released on bail, and for whom counsel is appointed, to report to such counsel at his office or at such other convenient place as counsel may designate. This should be done as promptly as possible and not later than five days from the date of the order of appointment.
(7) Attorneys appointed pursuant to any provision of this Plan shall conform to the highest standards of professional conduct, including but not limited to the provisions of the American Bar Association's draft "Code of Professional Responsibility".

F. *Duration, Substitution and Redetermination of Need*

* * *

(4) If at any time after appointment of counsel, the court or magistrate finds that the person is financially able to obtain counsel or to make partial payment for representation or other services, it may terminate the appointment of counsel or it may authorize or direct that such funds be paid to the appointed attorney, to any person or organization authorized to render investigative, expert, or other services or to the court for deposit in the Treasury as a reimbursement to the appropriation.

VI. CLAIMS FOR COMPENSATION

* * *

(7) If the case has proceeded to trial the Clerk of Court Shall present the claim for compensation to the trial judge.

(8) If the case does not proceed to trial and is concluded by sentence on a plea the Clerk shall present the claim for compensation to the sentencing judge.

[This Amended Plan was approved by the Judicial Council of the Third Circuit on June 12, 1974]

See also the Joint Appendix at 36 for additional operating procedures adopted by the Board of Judges.

APPENDIX B

INDICTMENT 74-277 FILED IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA IN *UNITED STATES V. FERRI*

Form DJ-15
(Ed. 2-3-66)

No. 74-277 Criminal

UNITED STATES ..... COURT

Western ..... *District of* Pennsylvania

..... *Division*

THE UNITED STATES OF AMERICA

vs.

FRANCIS D. FERRI a/k/a "RICK"
JOSEPH LAVERICH
KENNETH R. MATTHEWS

INDICTMENT

Count I: Maliciously damaging or attempting to damage by means of explosive of any property, etc. used in interstate commerce; conspiracy. (18 USC §844(i) and 371)(all defendants); Count II: Maliciously damaging or attempting to damage by means of explosive of any property, etc. used in interstate commerce; aiding and abetting. (18 USC §844(i) and 2)(all defendants): Counts III thru VI: Mail Fraud (18 USC §1341)(Matthews): Count VII: Receiving or possessing a firearm which is not registered (26 USC §5861(d) and aiding and abetting (18 USC §2)(all defendants); Count VIII: Receiving or possessing a firearm. (26 USC §5861(c) and aiding and abetting (18 USC §2) (all defendants) and Count IX: Making a firearm (26 USC §5861(f) and aiding and abetting (18 USC §2)(all defendants)

A true bill,

Ralph Hamilton
Foreman.

Filed in open court this ..... *day of* ....., *A. D. 19*....

.....
Clerk.

Bail, $.....

Richard L. Thornburgh

GPO 902-493

IN THE UNITED STATES COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	)	No. 74-277
v.	)	Criminal (18
FRANCIS D. FERRI	)	U.S.C. §2, 371,
a/k/a "RICK"	)	844(i) and 1341;
JOSEPH LAVERICH	)	26 U.S.C.
KENNETH R. MATTHEWS	)	§5861(c),
	)	5861(d),
	)	5861(f) and
	)	5871
	)	

Filed
Aug. 28, 1974
Bernhard Schaffler
Clerk, U.S. District Court
West. Dist. of Pennsylvania

FIRST COUNT

The Grand Jury charges:

That from on or about the 1st day of March, 1971 and continuously thereafter up to and including the 26th day of August, 1971, in the Western District of P nnsylvania and elsewhere, FRANCIS D. FERRI, a/k/a "RICK," JOSEPH LAVERICH, and KENNETH R. MATTHEWS, defendants herein, wilfully and knowingly did combine, conspire, confederate and agree together, with each other, and with Guy Elias Bertini, named as a co-conspirator but not as a defendant herein, and with divers other persons to the Grand Jury unknown to commit the following offense against the United States:

To maliciously damage by means and use of explosives, that is, dynamite and blasting caps, a 1971 Cadillac, Pennsylvania License Number M30292, belonging to Mr. Lynn P. Dunn, then being used in activities affecting interstate commerce.

In violation of Title 18, United States Code, Section 844(i).

OVERT ACTS

In furtherance of the conspiracy and to effect the objects thereof, the defendants and co-conspirators performed the following overt acts:

1. On or about the 26th day of August, 1971, in the Western District of Pennsylvania, the defendant, KENNETH R. MATTHEWS arranged to meet Lynn P. Dunn at the Dunes Supper Club in Plum Boro, Pennsylvania.

2. On or about the 26th day of August, 1971, in the Western District of Pennsylvania, the defendants, FRANCIS D. FERRI, a/k/a "RICK," and JOSEPH LAVERICH, and co-conspirator Guy Elias Bertini constructed a bomb.

3. On or about the 26th day of August, 1971, in the Western District of Pennsylvania, defendant FRANCIS D. FERRI, a/k/a "RICK," and co-conspirator Guy Elias Bertini placed the bomb in the automobile belonging to Lynn P. Dunn, that is a 1971 Cadillac, Pennsylvania License Number M30292.

In violation of Title 18, United States Code, Section 371.

SECOND COUNT

The Grand Jury further charges:

That on or about the 26th day of August, 1971, in the Western District of Pennsylvania, FRANCIS D. FERRI, a/k/a "RICK," JOSEPH LAVERICH, and KENNETH R. MATTHEWS, defendants herein, and Guy Elias Bertini, not named herein as a defendant, did maliciously damage by means of explosives, that is dynamite and blasting caps, a 1971 Cadillac, pennsylvania License Number M30292, belonging to Mr. Lynn P. Dunn, then being used in activities affecting interstate commerce, that is, the automobile was being used by Lynn P. Dunn, doing business as the L.P.D. Equity Corporation and in his own name, to sell and promote the sale of franchises of the International Music Corporation; to operate and carry on the business of the area directorship of the International Music Corporation; to sell and promote the sale of the common stock of the New American Films Corporation; and to promote the busines sof the New American Films Corporation, resulting in injuries to the person of Guy Elias Bertini.

In violation of Title 18, United States Code, Sections 844(i) and 2.

NOTE: COUNTS THREE, FOUR, FIVE AND SIX NAME ONLY FERRI'S CO-DEFENDANTS AND, ACCORDINGLY, HAVE BEEN OMITTED.

SEVENTH COURT

The Grand Jury further charges:

That on or about the 26th day of August, 1971, in the Western District of Pennsylvania, FRANCIS D. FERRI,

a/k/a "RICK," JOSEPH LAVERICH, KENNETH R. MATTHEWS, defendants herein, and Guy Elias Bertini, not named herein as a defendant, wilfully and knowingly possessed a firearm, that is, a destructive device, which had not been registered to him in the National Firearms Registration and Transfer Record as required by Chapter 53, Title 26, United States Code.

In violation of Title 26, United States Code, Sections 5861(d) and 5871, and Title 18, United States Code, Section 2.

EIGHTH COUNT

The Grand Jury further charges:

That on the 26th day of August, 1971, FRANCIS D. FERRI, a/k/a "RICK," JOSEPH LAVERICH, KENNETH R. MATTHEWS, defendants herein, and Guy Elias Bertini, not named herein as a defendant, wilfully and knowingly possessed a firearm, that is, a destructive device, made without the payment of a making tax as required by Section 5821, Title 26, United States Code, and made without the filing of a written application form with the Secretary of the Treasury as required by Section 5822, Title 26, United States Code.

In violation of Title 26, United States Code, Sections 5861(c) and 5871 and Title 18, United States Code, Section 2.

NINTH COUNT

The Grand Jury further charges:

That on or about the 26th day of August, 1971, in the

the Illinois Statute by providing the power in the established form of warrant itself, rather than in a separate enabling statute.[4]

As the Supreme Judicial Court of Massachusettes said in *Commonwealth* v. *Smith,* 348 N.E. 2d 101, 103 (Mass. 1976):

> "There is no general agreement in either holding or reasoning among the courts which have considered whether the search of any person present pursuant to a valid premises search warrant is a reasonable search under the Fourth Amendment."

Professor LaFave notes in his treatise *Search and Seizure (1978),* Vol. 2, § 4.9(c), that some courts have struck down searches which had been predicated upon the warrant powers cited above as being unconstitutional general searches, while other courts have upheld such searches under the statutory power conferred. LaFave believes that these apparently contradictory decisions can be reconciled upon closer examination of their facts. He maintains:

> The principle which emerges from these decisions is that it is not constitutionally permissible 'to search a person, not connected in any way with the place being searched, who merely happens to be on the premises and who is not mentioned or described in the affidavit of probable case upon which the warrant was issued'. Rather, 'the law requires that there be probable cause to believe that such persons are themselves participating in criminal activity' or, somewhat more precisely, that there be probable cause that evidence which might be concealed or destroyed is to be found upon the person searched.
> *Search and Seizure,* Vol. 2, § 4.9(c) at p. 144.

Appellee agrees from a survey of the decisions that the courts upholding searches pursuant to a provision such as Illinois'

[4] Del. Code Ann., Title 11, § 2310; Mass. Gen. Laws, Ann., ch. 276, §2A; N.H. Rev. Stat., Ann. §696-A:3.

§ 108-9 have required a connection between the persons to be searched and the place mentioned in the search warrant. However, such decisions have *not always required probable cause* to believe that such a connection exists or that the persons on the premises were involved in the criminal activity to which the warrant is directed.

The State of Illinois submits that under circumstances where these statutory powers are being employed by drug enforcement officers during search warrant raids on premises where hard narcotics are being sold, it is not necessary that there be full traditional probable cause to connect unknown persons on the premises to the persons or things to be searched by warrant, in order to constitutionally justify searches of the unnamed persons.

The Illinois Supreme Court has not as yet authoritatively construed Chapter 38, § 108-9. Illinois Appellate Court decisions which have construed the statute are of rather recent vintage and are all agreed that the statute does *not* authorize the search of any person found on any premises where a search warrant is being executed regardless of the circumstances. Illinois courts have been sensitive both to the constitutional danger of allowing the statute to transform otherwise valid specific warrants into general warrants and to the legislature's concern that objects sought by warrant will avoid discovery if persons on the premises are immunized from search in all but the most obvious cases of complicity.

In its opinion in the present case the Illinois Appellate Court, Second District, indicated that there were decided limits on the use of section 108-9(b), when it stated that it would not authorize a blanket search of persons or patrons found in a large retail or commercial establishment. The court pointed out in the present case that the search was conducted in a one-room bar where it was obvious from the complaint of the officer seeking the search warrant that heroin was being sold or

dispensed. The court reiterated that each case must be decided upon its own facts. Finding a reasonable application of the statute in this case, the court therefore held that section 108-9 was not unconstitutional in its application to the present facts. (Opinion at A., pp. 84-87)

Two years ago the Illinois Appellate Court, First District, in *People* v. *Dukes,* 363 N.E. 2d 62 (Ill. App. 1977), held that § 108-9 did not authorize the search of persons "on the premises described in the warrant without some showing of a connection with those premises, that the police officer reasonably suspected an attack, or that the person searched would destroy or conceal items described in the warrant." 363 N.E. 2d at 64. The Court ruled that the statute could not be used to sanction automatic searches of any person who may happen upon the premises during execution of a warrant because such an interpretation would afford no protection to innocent strangers having no connection whatsoever with the premises. In that case the defendant had knocked on the door of an apartment being searched pursuant to warrant for gambling material. The same court most recently in *People* v. *Gloria Miller,* ____ N.E. 2d ____, (1st Dist. Ill. App., June 25, 1979) (see opinion attached hereto as Brief Appendix C) construed section 108-9 more explicitly in light of this Court's decisions in *Delaware* v. *Prouse,* ____ U.S. ____, 47 U.S.L.W. 4323, 99 S. Ct. 1391 (1979) and *Terry* v. *Ohio,* 392 U.S. 1 (1968). Applying the test of balancing the intrusion on an individuals Fourth Amendment interest with the promotion of a legitimate government interest, the appellate court construed the statutory language "reasonably detain to search" to require that the executing officer be able to express at least an articulable and reasonable suspicion that either a search or a detention (or both) is for a purpose enumerated in § 108-9. The court also held that the power allowed by the statute to prevent destruction or concealment of items called for in the search warrant must be strictly limited to allow the search of only those persons on the

premises at the time the warrant was executed. In this case the search had already been completed when the outsider arrived. The *Miller* decision also followed *People* v. *Dukes* in requiring that the record show an indication that the officers knew the defendant had a sufficient connection with the premises to justify the search.

The Illinois Appellate Court, Third District, imposed similar limitations on § 108-9 in *People* v. *Boykin,* 382 N.E.2d 1369 (3rd Dist. Ill. App. 1978). There the court upheld the search of a person found in a residence during the execution of a search warrant, a person who had attempted to flee when the police entered the premises. The court specifically recognized

> "that section 108-9 cannot be read to authorize a routine search of anyone who happens to be on the premises regardless of circumstances. (*People* v. *Ybarra,* [citation omitted]; *People* v. *Dukes,* [citation omitted].) This section does authorize searches where it is shown that the person searched has some connection with those premises, that the police officer reasonably suspected an attack, or that the person searched would destroy or conceal items described in the warrant." 382 N.E. 2d at 1372.

It is important to note that this appellate panel cited the appellate court opinion in the present case as supporting the proposition that 108-9 must be read with certain limitations.

It is thus clear that the Brief Amicus Curiae of the State Public Defender of California in support of appellant is incorrect when, at page 4, it alleges that the Illinois court has authoritatively construed this statute to vest absolute discretion in searching officers to search any person present on premises described in a warrant regardless of the circumstances. Such a statement completely ignores not only the circumspect language of the decision below but also the very clear limitations imposed on the statute by other Illinois courts in recent months. Nevertheless, it is true that the Illinois opinions cited above

have not mentioned a requirement of probable cause to believe that a person on premises being searched under a warrant is concealing or destroying items sought in the warrant. Instead, the Illinois courts talk of the need for a "reasonable suspicion" or "reasonable belief" that such activity is occurring along with a reasonable belief that there is some connection between the person to be searched and the premises.

B. Judicial Authorities From Other Jurisdictions.

The decisions of other state courts interpreting similar statutory provisions have also refused to require full traditional probable cause in order to search a person present on, and connected with the premises listed in the warrant. The Court that has most frequently done so (contrary to the contention of the California amicus brief, supra) is the Georgia Court of Appeals. Recently in *Campbell* v. *State,* 228 S. E. 2d 309 (Ga. App. 1976), U.S. appeal dismissed, 429 U.S. 1083 (1977), the court held that where police armed with a warrant made a drug raid on a residence containing several persons not named in the warrant, there was a valid search of Campbell revealing a small plastic bottle containing cocaine. Discussing the very similar Georgia statutory provision, Code Ann. § 27-309, the court ruled that it allowed a very limited search of persons present on the premises at the time of the search, only to look for weapons or for the items particularly described in the warrant. During a pat-down search the police found a small plastic bottle in the defendant's right-hand pocket. "Whether or not that bottle could be removed from defendant's pocket depended upon whether police reasonably believed that this bottle contained cocaine." The court ruled that under the circumstances here, involving continuous useage, sale and storage of cocaine on the premises, that the police did have a reasonable belief that Campbell's bottle contained cocaine.

This decision is notable also because it is apparently the only other one on the subject that has ever given rise to a direct

appeal to this Court alleging an unconstitutional interpretation of its state's warrant powers statute. However, the appeal was dismissed on February 22, 1977 for want of jurisdiction and certiorari was then denied.[5]

The Supreme Court of Kansas has also upheld a statute identical to Illinois' Section 108-9, interpreting it to allow only reasonable detention and search of a person under the conditions specified. *State* v. *Loudermilk,* 494 P.2d 1174 (Kans. S. Ct. 1972). The Kansas court held that the search warrant issued to seize opium and related instrumentalities from a building where agents had seen opium users coming and going established probable cause to believe that opium was concealed either on the premises or on the persons of those present.

> Narcotics such as heroin, are easily concealed on a person and may readily be disposed of. Where, as in this case, probable cause to believe that a drug is kept or concealed on certain described premises is established to the satisfaction of a proper magistrate, the search of a person found on the premises in the execution of a search warrant is not only reasonable but necessary to secure effective enforcement of the Uniform Narcotic Drug Act.
> 494 P.2d at 1178.

The District of Columbia Court of Appeals in applying Section 23-524(g) of the D.C. Code of 1973 has in two decisions allowed the use of evidence obtained from the search of a person on premises which were examined pursuant to a warrant, on both occasions for gambling equipment and paraphernalia. *United States* v. *Graves,* 315 A.2d 559 (D.C. Ct. of

[5] The question presented in the jurisdictional statement in the *Campbell* appeal was "may a statute pertaining to execution of warrants be held constitutional if it is construed to authorize routine weapon searches in absence of factors required for pat down, and to authorize extension of search expressly permitted by warrant to visitors on described premises in the absence of probable cause to arrest or search such visitors?" 45 U.S.L.W. 3518.

Appeals 1974); *United States* v. *Miller,* 298 A.2d 34 (D.C. Ct. of Appeals 1971). In neither decision did the Court of Appeals require probable cause to believe that persons not named in the warrant but present on the searched premises were carrying objects sought in the warrant. In *Graves* the court noted that an informant had told officers just prior to the execution of the warrant that the people were inside that had the numbers slips on them; the court interpreted this as allowing the officers to reasonably believe that all the persons inside were involved in the gambling activity. The obviously reasonable limitations on the authority to search persons present on the premises being searched pursuant to a warrant were recognized. However, the court found that the search was not unreasonable under the Fourth Amendment and said "We do not believe on these facts that a suspect should be allowed to circumvent a warrant to search premises by the simple device of picking up the illegal object and holding it in his hand or by placing it in his sock. We know of no rule of law that requires such result." 315 A.2d at 561. The court noted there was no indication in the record that any of the people present had been in the searched delicatessen in order to shop.

In *Miller* the police sought to execute a warrant seeking gambling paraphernalia at an after hours bar. When the door was not opened at their request and running was heard inside, they forced the door and patted down approximately 20 persons present to determine if anyone had weapons or gambling paraphernalia. This search revealed a tinfoil packet of narcotics. The court held that the previous finding of probable cause exemplified in the warrant and the reactions of those in the bar when the search was announced combined to give the police "reasonable cause to believe that the occupants possessed, concealed and were about to remove or destroy the evidence for which they had a search warrant." "This belief

alone gave the officers sufficient ground to search the individuals present. *Nix* v. *United States, supra.*"[6] 298 A.2d at 36.

The Supreme Court of Florida held in the case of a gambling raid made pursuant to search warrant in *Samuel* v. *State,* 222 So.2d 3 (Fla. S. Ct. 1969) that the failure to name all the persons to be found on the premises did not make the warrant invalid to authorize the search of such persons. The warrant authorized the search of the building as well as "the person or all persons therein who shall be connected with or suspected of being connected with the operating or maintaining of said gaming or gambling games, devices, equipment and paraphernalia." The court held:

> We think that the section 22 organic requirement [similar to the Fourth Amendment] is satisfied when the judicial determination is made that there is probable cause to believe that the premises are being used for an illegal purpose such as gambling; and that it is entirely reasonable and proper to search persons found on such premises when there are reasonable grounds to suspect—that is believe—that such persons are engaged in or connected with the unlawful activities that are the subject matter of the search. (citations omitted)
> 222 So.2d at 5.

The Supreme Court of Washington made a similar statement in *City of Olympia* v. *Culp,* 240 P. 360, 361-62 (1925) qualifying the right to search persons found on the premises by the

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[6] In this Opinion, the court uses "good cause" and "reasonable cause" interchangeably but speaks of "probable cause" needed for issuance of the underlying warrant. Appellee submits that, in the context of search and seizure, reasonable cause is not as high a standard as probable cause. For example, paraphrasing the lesser standard for stops formulated by *Terry* v. *Ohio,* this Court's Opinion in *U.S.* v. *Brignoni-Ponce,* 422 U.S. at 881-3, uses interchangeably the words "reasonable belief," "reasonable grounds" and "reasonable suspicion." "Reasonable cause" also carries the same meaning as the Terry formulation.

requirement that officers have "reasonable cause to believe" that the persons have articles for which the search is instituted. The words probable cause are not used. The court also said

> Officers making a search of premises under a search warrant may lawfully detain all persons found therein until the search is concluded. Any other rule would frustrate the purposes of the search; the officers would be compelled to stand idly by while the articles for which the search was instituted were carried away.

See also, *VanHorn* v. *State,* 496 P.2d 121, 123 (Okl. Cr. App. 1972) agreeing with the above formulation; *Brown* v. *State,* 498 S.W.2d 343 (Tex. Ct. App. 1973); Drug Agents Guide to Search And Seizure, U.S. D.E.A. (1978) p. 79-80.

Although several state courts have construed their warrant forms or statutes similar to Illinois' Section 108-9 to require full probable cause for the search of unnamed persons on the premises when a warrant is being executed, e.g., *Commonwealth* v. *Smith, supra,* at least six of the decisions cited as being on point by appellant and by the California State Defender *do not* stand for this proposition.[7]

[7] *Willis* v. *State,* 177 S.E.2d 487 (Ga. App. 1970) is not inconsistent with the *Campbell* decision cited above since it upheld search of persons as being reasonable under the Georgia statute when they were gathered together in an apartment where drugs were in a container on a table within easy reach of all of them. The court makes no mention of probable cause in the decision and indeed describes the evidence for the personal search as being "skimpy and marginal [but] sufficient to support the search under the warrant charging a possessory offense and in accordance with Code Ann. Section 27-309 (b)." 177 S.E.2d at 490. Similarly, *State* v. *Cochran,* 217 S.E.2d 181 (Ga. App. 1975), which invalidated the search of individuals in an automobile leaving the premises about to be searched under a warrant "to search . . . the places and persons for the property specified" described as "illegal drugs and narcotics" in "automobiles, on persons and in two buildings located on the premises and curtilage known as the Sunshine Club," held that the search warrant was a general one. There was no limitation in the Cochran warrant, unlike

(footnote continued on next page)

The only authority from this Court which has been quoted as bearing directly upon the present issue is the decision in *United States* v. *DiRe,* 332 U.S. 581 (1948).[8] In that case the government claimed that the search of an automobile passenger

(footnote continued from preceding page)

the warrant in *Willis* and the Illinois statute, limiting it to persons who reasonably might be involved in the unlawful activity. Additionally, the court did not reach the issue of whether the warrant would have been valid as applied to the building housing the Sunshine Club under the circumstances.

The decision in *United States* v. *Branch,* 545 F.2d 177 (D.C. Cir. 1976) noted the difficulty of the present issue but never considered or decided it because the government never made the argument. In *United States* v. *Micheli,* 485 F.2d 425 (1st Cir. 1973) the court in dicta described the rules at either end of the premises search spectrum but did not discuss or confront the persons-on-premises search question presented in this case; the court did, however, allow the search of an unnamed person's briefcase when it had been left on the premises to be searched and the individual was connected with the premises. *McAllister* v. *State,* 306 N.E.2d 395 (Ind. App. 1974) was decided primarily on state procedural grounds involving the failure to incorporate the complaint for search warrant in the body of the warrant itself. The decision in *State* v. *Bradbury,* 243 A.2d 302 (N.H. S.Ct. 1968) is not inconsistent with the rulings of the Illinois courts. The decision invalidated a search of another student found in the dormitory room of an individual who was alleged in the warrant to be keeping marijuana. The court invalidated the search because there was no connection in any way between the individual searched and the place being searched, the indication was that the individual simply happened to be on the premises. The Illinois decisions cited above also require some connection with the premises shown either in the complaint for search warrant or in circumstances occurring at the time of the search.

[8] *Sibron* v. *New York,* 392 U.S. 40 (1968) did not decide any question presented by the instant appeal. Sibron's case was decided on the basis of no probable cause to arrest him and no legitimate suspicion that he was armed or was dealing in narcotics. Justice Harlan even stated that the eight-hour police surveillance had "pointed away from suspicion" of Sibron rather than adding to it. 392 U.S. at 74.

was justifiable as being incident to the right to search the vehicle on probable cause, without a warrant. Yet the government conceded that if an officer was armed with a search warrant for a residence only, he could not search all persons found in that residence. The Court naturally responded negatively to the suggestion that power not allowed to an officer under a warrant could be allowed in a situation of a search without a warrant. This Court did invalidate the thorough search of the passenger in the car where the informer had disclosed counterfeit government coupons, saying:

> We are not convinced that a person, by mere presence in a suspected car, loses immunities from search of his person to which he would otherwise be entitled.
> 332 U.S. at 587.

However, the Court did not decide whether, without Congressional authorization, any automobile is subject to search without warrant on reasonable cause to believe that it contained contraband. There seemed to be great importance ascribed to the fact that in DiRe's case there was no search of the automobile itself and indeed the automobile search doctrine appears to have been simply a pretext on which to search the passengers personally. Importantly, in discussing the doctrine of *Carroll* v. *United States,* 267 U.S. 132 (1925), the Court again held that permitting warrantless searches of automobiles was consistent with the Fourth Amendment primarily because it was in response to the dictates of an Act of Congress. The Court stated:

> Obviously the Court should be reluctant to decide that a search thus authorized by Congress was unreasonable and that the act was, therefore, unconstitutional. In view of the strong presumption of constitutionality due to an act of Congress, especially when it turns on what is "reasonable", the *Carroll* decision falls short of establishing a doctrine that, without such legislation, automobiles nonetheless are

> subject to search without warrant in the enforcement of all federal statutes.
> 332 U.S. at 585

In the instant case, the General Assembly of Illinois has decided that it is reasonable for officers executing a lawful search warrant to be able to detain and search persons on the premises under reasonable circumstances, especially in narcotics cases. The above dicta in *DiRe* is more supportive of the State's position in the present case than the dicta cited by appellant is destructive of that position.

C. The Important Governmental Interests In Controlling Narcotics and Encouraging Use of Warrants.

In addition to the dictates of common sense, there are, as mentioned above, a goodly number of courts and legislatures that have agreed with the Illinois General Assembly that the urgency of controlling the narcotics traffic and the every-day street realities of that nefarious business require giving officers executing search warrants the power to search unnamed persons on the premises, when there is a reasonable belief that they are connected with the unlawful activity and may be concealing or carrying away the contraband.

> It is well to remember that Congress itself has found that:
> "the illegal importation, manufacture, distribution and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people. . . . Local distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances. . . . Federal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic."
> 21 U.S.C. §§ 801(2), (4) & (6).

The Second Circuit Court of Appeals, in upholding the stop of travelers in a narcotics smuggling case on the basis of a need to stop, has described the traffic in the following terms:

> "A significant portion of that need is supplied by the inherent odiousness and gravity of the offense, the societal costs of which, in terms of ruined and wasted lives, are staggering".
> *United States* v. *Oates*, 560 F.2d at 59.

The legislatures of several states (see footnote 3) and the courts of Kansas, the District of Columbia, and Washington cited above have all explicitly stated the need for officers searching under a warrant to have the power to search persons on the premises lest the warrant be made a mockery through the concealment of the objects sought. In *State* v. *DeSimone*, 288 A.2d 849 (N.J. S.Ct. 1972), Chief Justice Weintraub described this as being a power needed by the government to deal with crime.

Professor LaFave in discussing the Illinois statute in a law review article, "Search and Seizure: 'The Course Of True Law . . . Has Not . . . Run Smooth' " 1966, Ill.L.Rev., p. 266, 272 states:

> It is submitted that a realistic appraisal of the situation facing the officer executing a search warrant compels the conclusion that *under some circumstances* a right to search occupants of the place named in the warrant is essential. The unresolved question is what connection must exist between the person and the premises and what other circumstances must be present to justify such action.

LaFave concludes that there must be probable cause to search a particular individual who is found at a place where a search warrant is about to be executed, but he admits that there is a problem where probable cause is lacking and yet persons on the premises may be concealing items sought in the warrant. In his treatise *Search and Seizure*, Vol. 2 at Section 4.9, p. 147, he asks "Are the police powerless to take any steps at all to foreclose the risk that the person may depart the premises with critical evidence concealed on his person?" Put differently, is there any practical step officers can take other than what the

I.B.I. agents did in the instant case? The only light LaFave sheds on the subject is contained in a quotation from *United States* v. *Festa*, 192 F. Supp. 160 (D. Mass. 1960). The court there speculated that it might be permissible for an officer executing a warrant aimed at an easily-concealed type of property to order a person on the premises to remain until the officer can be certain that the detainee is not engaged in removing the property specified in the warrant. See also *State* v. *Wise*, 284 A.2d 292, 294 (Del. S. Ct. 1971). LaFave finds this to be a very persuasive suggestion, especially in light of this Court's subsequent decision in *Terry* v. *Ohio*.

The State of Illinois suggests that the mere ability to detain a person on the premises to interrogate him and investigate the possibility that he may be concealing narcotics mentioned in the warrant is hardly ever sufficient to create probable cause to either excuse the detainee or to search his person. Even if a fairly prolonged detention on the spot did not constitute an illegal arrest (which this Court's decisions have given every reason to believe it does), nevertheless, an officer's ability to question or investigate experienced traffickers in hard drugs, who have undoubtedly learned to be discreet about their activities, will hardly ever yield definite information to give probable cause for believing that specific drugs are concealed on an individual person. The suggestion in *United States* v. *Festa* being entirely impractical in narcotics cases, if a hard and fast probable cause rule is imposed on the search of persons not named in the warrant, there can be no resolution of Professor LaFave's question. Many of the circumstances in which he sees an essential right to search occupants of the place named in the warrant will then not be recognized in the law.

The facts of the present case are illustrative of the problem. The officers executing the instant search warrant for the Aurora Tap had information (already accepted by an impartial issuing judge) that tinfoil packets had frequently been seen behind the

bar and on the person of the bartender Greg by the informant, a patron of the tavern. (A. 3) The complaint stated that the bartender was going to be selling packets of heroin at the bar on March 1, 1976. (A. 3) Contained within the informant's affidavit was the undeniable inference that some patrons of the small tavern were the intended purchasers of the heroin sought in the warrant and, perhaps, were even dealers themselves. The patrons in the tavern while the warrant was being executed were most likely people who frequented the neighborhood establishment; they were connected with the tavern by their choice to be present in a place where possession and sale of narcotics were rather open and nortorious. (A. 2-3) The IBI agents clearly had a reasonable belief or suspicion that some or all of the patrons would have concealed on their persons some portion of the substances sought to be recovered in the warrant.[9] And yet under traditional probable cause standards, it might not be said that the police had probable cause to believe that any specific individual in the Aurora Tap was concealing heroin in tinfoil packets on his person, since no activity was observed by the police as they entered and no actions were taken by the patrons which would shed any light on their involvement during the initial minutes of the search warrant execution. If, contrary to the Illinois statute and the decisions of Illinois courts, the officers were unable to follow through on their reasonable belief that search objects were being concealed by some or all of the patrons and if they were not permitted to even pat down the patrons as part of the execution of the warrant, it is logical to expect that some or all of the patrons would have walked out of the tavern with some or all of the objects of the warrant in their possession. Nothing that the agents could have done, short of the greater intrusion of lengthy detention amounting to arrest or of detailed physical exam-

[9] The Return filed with this search warrant indicates that other patrons besides Ybarra were found to be concealing narcotics paraphernalia, i.e., hypodermic needles, and marijuana. (A. 7).

ination, would have informed them which of the patrons to search under a probable cause standard.

With no legal alternative for discovering objects of the search warrant concealed in patrons' clothing and given sanctuary there by a stiff probable cause standard independent of the warrant, the officers would undoubtedly have felt that their efforts and the warrant's purpose had been defeated to a great extent. The value of the search warrant would have seemed diminished, if not obliterated, in their eyes. As Chief Justice Weintraub said in the course of his decision in *State* v. *DeSimone, supra:*

> Needless to say there is no official arrogance when the officers place the facts before a magistrate for his view rather than search and seize upon their own assessment of the factual pattern when it accrued. Since it furthers the constitutional purpose to encourage applications to a magistrate [for a search warrant], we should take a view of the problem which will make that course feasible.
> 288 A. 2d at 851.

Unrealistic limitations on the execution of search warrants, if they endanger the officers' safety or obstruct and defeat the narcotics warrant's purpose, will definitely discourage applications to magistrates by drug enforcement officers for search warrants involving places where strangers may be found, which is to say, everyplace drugs are peddled.

D. Application of the Balancing Test Yields A Rule of Reasonableness Governing Personal Narcotics Searches Incident to Execution of Search Warrants:

To prevent such an unhappy turn of events and to encourage the use of judicially scrutinized and authorized search warrants for narcotics on premises where strangers will be found, this Court should employ the *Terry* balancing test to allow searches of persons on compact premises specified in the warrant, when there is information that drug trafficking is

taking place at that location and the police have a *reasonable belief* that the persons present are connected with the criminal activity and are likely to be concealing the objects of the warrant in their clothing.

Applying the analysis used by this Court to permit searches on less than traditional probable cause in *Terry* v. *Ohio,* 392 U.S. 1, *Camara* v. *Municipal Court,* 387 U.S. 523 (1967), *United States* v. *Brignoni-Ponce,* 422 U.S. 873 (1975) and *Marshall* v. *Barlow's Inc.* 98 S. Ct. 1816 (1978), it is first noted that the governmental interests to be served by the ruling suggested are extremely strong. In line with the findings by Congress cited above in 21 U.S.C. § 801 and echoed in the enactments of every legislature in the nation, the Executive Branch of each government has an important interest in effectively controlling traffic in dangerous, hard drugs especially heroin. At the same time, the Judicial Branches of our governments have an interest in preserving the integrity and effectiveness of the search warrant, an interest which can be seen reflected in the many decisions over the past 20 years strengthening the warrant clause of the Fourth Amendment.

Balanced against these interests are the individual's concern with his privacy and his desire to avoid the indignities of personal searches. However, in the circumstance where an individual willingly enters a place where narcotics possession and/or sales is open and nortorious, there can be no realistic expectation that law enforcement authorities may not subject the individual to some inconvenience as a result of his choice. Appellee submits that only a minimal amount of inconvenience would result from the slight intrusion of a brief pat-down to discover forms in an individual's clothing which would give probable cause to believe he was carrying illicit drugs.

Clearly, the balance swings heavily toward the two governmental interests which would be served by a rule of reasonableness. Should the result required by balancing societal

interests here be different than it was in *Adams* v. *Williams*, 407 U.S. at 147, where this Court approved a quick search of a man sitting peacefully in his car at night based upon an informant's tip that the man was carrying narcotics and a pistol, information that may not have been sufficient for a search warrant? Should the result be different than it was in *United States* v. *Brignoni-Ponce*, 422 U.S. 873, where this Court approved limited investigative stops of unknown automobiles by roving border patrols in the border area, on reasonable suspicion that they might be carrying illegal aliens? Is it less reasonable in defining Fourth Amendment standards to accommodate the practicalities of government efforts to control the dangerous, debilitating narcotics traffic than to accommodate the realities of building code enforcement as did *Camara* v. *Municipal Court*, 387 U.S. 523?

Illinois submits that the twin governmental interests in the present situation are just as strong as those in the cited cases and that the inconvenience to or intrusion on bar patrons is no greater than the intrusions approved above. Therefore, the balancing test must yield the same result in the circumstances of the present narcotics search warrant case. A pat-down of patrons who are found on compact premises, are reasonably believed to have a connection with the premises or the criminal activity and are reasonably believed to have concealed in their clothes the objects of the narcotics search warrant should be allowed under the Fourth Amendment.

Ill. Rev. Stat., Ch. 38, § 108-9, as construed allows no broader searches of persons on premises which are being searched under warrant than is justified by the above balancing analysis. The statute was therefore constitutionally applied to

the facts of this case and Ybarra's conviction should be affirmed.[10]

[10] The same result can be reached in this appeal without removing the requirement of probable cause to search individual patrons on the premises, if the quantum of information and the degree of certainty required for probable cause in this situation is lessened, as in *Camara* v. *Municipal Court, supra.* Professor LaFave discusses the concept of a variable test for probable cause and presents approaches to that concept which could be used to find that the IBI agents in the present case *did* have probable cause to conduct a pat-down search of all patrons in the Aurora Tap for the objects specified in the search warrant. 1 LaFave, *Search and Seizure* (1978), § 3.2(a) and (e).

CONCLUSION

Whether this Court views the present appeal as one involving a frisk yielding probable cause to search for contraband or as a simple search incident to the execution of a narcotics warrant and pursuant to proper statutory authority, the search of appellant was proper under the Fourth Amendment. The statute attacked by appellant, if it had any effect on the outcome of his motion to suppress in light of *Terry* v. *Ohio,* was constitutionally applied by the court to the facts of his case. Appellant's conviction should be affirmed.

Respectfully submitted,

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BRIEF
APPENDIX A

BRIEF APPENDIX A

ASSAULTS ON DEA AGENTS

A Description and Analysis of Domestic Assault Incidents
(July, 1975 through December, 1976)

Prepared by:

Statistical and Data
Services Division
United States Dept. of Justice
Drug Enforcement Administration

INTRODUCTION

Purpose

This study was undertaken in an attempt to provide DEA management and Agent personnel with the most comprehensive data available regarding the conditions and circumstances surrounding assault incidents. The report's primary purpose is to provide descriptions and analyses of identified assaults which will prove beneficial in reducing both the risks involved and the number of assaults that occur during the course of investigative and related activity.

Sources

In order that all assaults would be accounted for, the scope of the data base employed for this report has been expanded over that of prior DEA assault studies. For this reason, no statistical comparisons or analyses of trends between this and preceding studies will be presented.

To insure total assault coverage, three sources have been utilized. The first of these is the "Discharge of Firearms" file maintained by the Office of Internal Security. This file contains accounts of all reported discharge of firearm incidents by Agents as well as several other assault incidents. The available listings were furnished to the appropriate Internal Security Field Offices and verified as accurate and complete. Second, the "Assaults on Agent" File maintained by the Investigative Records Section was searched. This file is a compilation of random assault incidents frequently unrelated to a specific investigation. Third, the Monthly Report of Assaults (DEA 346) submitted by each region was also utilized. Each individual region was then queried and asked to verify in writing regarding the actual number and corresponding case file listing of assault incidents reported on the DEA 346. It is believed that these sources encompass all domestic assaults occurring during the July 1, 1975—December 31, 1976 time

frame. Furthermore, to insure that the data contained in the above sources was not misleading, the corresponding case file in which an assault was identified was also studied.

Definition

As previously noted, the sources utilized provide an inclusive listing of assault incidents, ranging from assaults directly related to specific investigations to those related to various other aspects of enforcement activity. In an effort to provide a comprehensive insight into the nature of these occurrences, no identified assaults, with the exception of a limited number of incidents clearly beyond the scope of investigative activity, were omitted. Specific categories have been established to distinguish between the various types of assault situations.

With this in mind, a definition of what constituted an assault was formulated. Within the scope of this study, an assault is defined as the intentional or attempted use of physical force or weapon against a DEA Agent.[11] It should be noted, however, that in a number of situations a defendant injured or attempted to injure more than one Agent. For example, in one particular situation a defendant physically struck a State and Local Officer who was attempting to arrest him and then, moments later, struck another State and Local Officer. For purposes of this study, this is counted as one assault incident rather than two assaults.

* * *

[11] Unless otherwise specified, a DEA Agent also includes Task Force, other Federal and State and Local Officers.

I. STATISTICAL BREAKDOWNS

Total Assaults Over Time

A total of seventy-two domestic assault incidents occurred during the July 1, 1975, thru December 31, 1976, time frame. It is significant to note that of the seventy-two incidents, thirty-nine took place during the last six months of CY 1975 while only thirty-three occurred for all of CY 1976. If 2nd half CY figures are prorated to include the entire calendar year,[12] the resultant seventy-eight assaults would indicate a decrease of 58% in total assaults from CY 1975 to CY 1976.

* * *

Situation

By far, the most dangerous segment of an investigation is the arrest situation. Approximately 95% of all assaults occurred as an arrest was being made.[13] For purposes of this study, the arrest situation has been subdivided into two categories: (a) arrests in conjunction with a purchase of evidence and, (b) arrests in conjunction with the execution of warrants and similarly related circumstances. Both categories were equally divided (25 each) regarding the number of assault incidents.

Quite surprisingly, the number of robbery assaults during a purchase of evidence was extremely low (4). Furthermore, it should be noted that all four assaults occurred during the last six months of CY 75. No robbery assaults were recorded for the entire CY 1976.

[12]As previously mentioned, data base dissimilarities between this and prior DEA assault studies prohibit comparison of statistics.

[13] However, in the execution of warrants category of assaults almost half initially involved execution of search warrants or other searches, i.e. 10 or 12 of the 25 assault incidents studied. (This footnote added by the State of Illinois.)]

Assaults of all remaining classifications, with the possible exception of one category,[14] were minimal.

Situation (July 1, 1975-Dec 31, 1976	# of Assault Incidents
Arrest (execution of warrants and related circumstances)	25
Arrest (purchase of evidence)	25
Robbery (during purchase of evidence)	4
Surveillance	2
Compromise of Identity	2
Other (non-case related)	10
Other (case-related)	4
Total	72

Location of Assaults

Attempts to arrest defendants while they were seated in our behind the wheel of an auto precipitated the highest number of assault incidents. Invariably, in the majority of these cases, the defendant was attempting to escape and, in so doing, struck the officer with his vehicle.

Statistics reveal that assaults occurred in the following locations:

Automobile	— 27
Open Area	— 20
Private Residence	— 13
Other	— 10
Hotel/Motel	— 2
Total	72

Defendant Weapons

The firearm was the weapon used in nearly 38% of all assault incidents. Physical attacks and assaults involving the use of automobiles ranked second with identical numbers of assault incidents, eighteen each. A fourth category identifies

[14] See Section VII, (other non-case related assaults).

four incidents in which an unarmed defendant struggled for possession of the Agent's service revolver.

Weapon	# of Assault Incidents
Firearm	27a
Auto	18
Physical Attack	18
Struggle for Agent's Service Revolver	4
Knife	2
Other	3b
Total	72

a. One incident involved the use of both a firearm and knife.

b. Other weapons: (1) chemical substance; (2) bottle; (3) attache case.

* * *

Primary Drugs Removed

Of the fifty-eight assault incidents directly related to an ongoing investigation, heroin or cocaine was the primary drug removed or negotiated for in thirty-nine or 67% of the investigations. Although a review was initiated, no determination could be made as to whether or not drug type was a contributing factor in the assaults studied.

Primary Drug Removed/Negotiated	# of Cases	%
Heroin	21	36%
Cocaine	18	31%
Marihuana	5	9%
PCP	4	6%
Amphetamine	3	5%
LSD	3	5%
Methaqualone	1	2%
Quaaludes	1	2%
Methamphetamine	1	2%
Hashish	1	2%
Total	58	100%

II. ARRESTS (EXECUTION OF WARRANTS AND RELATED CIRCUMSTANCES)

Description

Location of Assault

Thirty-five percent of all assaults occurred as Agents were executing arrest/search warrants or engaged in similarly related circumstances. Of these, eighteen of the twenty-five assault attempts took place in either a private residence or automobile. A breakdown of the location of assaults is as follows:

Location	# of assaults	Percent
Private Residence	10	40%
Automobile	8	32%
Open Area	3	12%
Other	4	16%
Total	25	100%

Type of Assault

A strong correlation exists between the location of the assault attempt and the weapon utilized. Of the ten assaults occurring in a private residence, a firearm was the primary weapon employed in six incidents while, in two other occurrences, unarmed defendants struggled for possession of the Agents' service revolver. In each of the eight attempts to arrest a defendant in an auto, the auto itself was the instrument utilized as a weapon. As previously mentioned, the defendants were invariably attempting to escape and, in so doing, struck the officers with their vehicles. It should be noted that in four incidents the arresting officers did not set out to arrest a defendant while he was in his auto but, due to extenuating circumstances, were forced to deviate from the planned arrest situation. Of the seven assaults occurring in an open area and other locations,[15] only one incident involved the use of a firearm. The remaining six were physical attacks only.

* * *

[15] Other location includes: airport terminal, airport first aid room, airport restroom, carport.

APPENDIX OF CASES

Private Residence

1. An informant was to be utilized in an attempt to gain entry into an apartment and apprehend a defendant without violence. The informant accompanied by two SA's arrived and was admitted into the apartment. After entry, the defendant inquired as to the identities of the SA's. Before the informant could respond, the defendant stood and aimed a pistol at the SA's, ordering them and the informant to place their hands on their heads and remain motionless. Another person then blocked the door and was instructed by defendant to search everyone. This individual stepped toward the SA's and, in so doing, left the door unguarded. Both SA's, while talking in an attempt to pacify the defendant, inched toward door. The defendant observed this movement and cocked the pistol. Both SA's continued talking and managed to open the door and back out of the apartment. The door was then locked from the inside. Surveillance was contacted and instructed to assist. Both SA's knocked again and identified themselves. The defendant refused entry and advised he was going to dial 911. Both SA's encouraged him to do so. The defendant eventually unlocked the door and surveillance entered the apartment. The defendant ran into the kitchen and struggled violently before he was subdued and arrested. One SA sustained neck and knee injuries.
2. Five SA's arrived at a basement apartment to effect the arrest of a defendant. An SA knocked on the door which was opened by another person. The SA identified himself at which time this individual attempted to close the door and began yelling to alert person(s) within. The SA pulled the door open and ran to the rear of the apartment. Another SA attempted to push the subject aside to allow entrance of the other officers. The subject struggled with the SA and grabbed his service revolver, partially cocking the hammer. The other SA's then assisted in subduing and arresting the subject. Defendant was also arrested without further incident. No injuries.

3. Three SA's arrived at a residence to execute the arrest warrant. Two SA's approached the front door while one covered the rear. The defendant came to the front window at which time both SA's identified themselves and stated they wished to talk. After waiting approximately three minutes, the defendant invited one SA, whom he had previously negotiated with, inside. The door was shut on the other SA with defendant advising him to remain outside. Inside the residence, the SA displayed the arrest warrant. Defendant then turned and pushed the SA away. The SA drew his service revolver and advised the defendant to remain motionless. The defendant ran to the hallway and picked up a shotgun. The SA grabbed the barrel of the shotgun and began wrestling with the defendant. Both SA's then entered and assisted in subduing and arresting the defendant. No injuries.
4. As an individual entered the front doorway of the residence, both SA's identified themselves and attempted to question him concerning the location of defendant. The individual then attempted to push both SA's out the doorway. The SA's explained they only wished to question him concerning the whereabouts of defendant. The subject became more abusive and proceeded to shove and punch one of the SA's. The subject was then subdued and placed under arrest. Defendant, who was in the basement at time of the assault incident, was later arrested by surveillance. No injuries.
5. Prior intelligence indicated that a certain residence was being utilized as a storage house for heroin distribution. An SA arrived and knocked on the front door of the residence. (SA was accompanied by seven enforcement officers who concealed themselves from view). The defendant responded but denied knowing the SA, announcing the door would not be opened unless it was the police with a search warrant. The SA then identified himself, stated that he was in possession of a search warrant and requested that the defendant open the door. No reply was received. The SA again announced his presence and purpose. No reply was received, therefore, forced entry was initiated. At this time, the defendant raised the second floor window and fired one shot from a revolver. Two SA's then returned a total of ten shots at the window area. When firing ceased, a

State and Local officer observed movement at the front window area and, in an attempt to gain control of the downstairs area, thrust his gun through the window, discharging one round into the ceiling. At this time, the SA again ordered the defendant to open the door and lay on the floor. The defendant complied and was placed under arrest. No injuries.

6. Six SA's and one A.T.F. Agent, in possession of a Federal warrant, arrived at the defendant's apartment, knocked on the front door and announced their office and purpose. When no response was received, entry was forced. After entering, one SA shouted, "Federal Agents with a search warrant". As the SA proceeded down the hallway, he again announced his office and purpose. Arriving at the bedroom, the SA once again announced his office and proceeded to kick the bedroom door open. At this time he observed the defendant sitting up in a corner of the room with a gun aimed at the bedroom door. The SA then stepped back out of the doorway and ordered the defendant to drop the gun. Looking back into the room, he noticed that the defendant still had the gun pointed at the door. The SA then fired one round from the shotgun before stepping back from the door. The SA again ordered the defendant to drop his gun. Looking back into the room, he noticed that the defendant's hands and head were now concealed by a blanket. Believing that he was still in danger the SA fired one more round from the shotgun. Defendant then surrendered. Defendant sustained fatal gunshot wounds.

7. In possession of a Federal warrant, four SA's and three U.S. Marshalls surrounded the defendant's house, covering all exits. Two SA's and one U.S. Marshall knocked on the front door and identified themselves to the defendant who retreated to the second floor landing after refusing entry. The SA attempted entry but to no avail. Shortly thereafter, the defendant reappeared and fired two successive shots from a pistol. After returning fire, the officers again identified themselves, ordering defendant to surrender. After receiving assurance that no harm would come, the defendant threw his pistol down the stairs and surrendered. One SA received treatment for removal of glass in his left eye.

8. Two SA's and one State and Local officer arrived at the entrance of a trailer home. An SA announced on two separate occasions that he was a Federal Agent with a search warrant. When no reply was received, the State and Local officer kicked the front door open and was immediately confronted by the defendant with drawn automatic pistol. The State and Local officer ordered the defendant to drop his weapon. The defendant refused, further cocking the hammer of his pistol. The State and Local officer, believing that the defendant was about to shoot him, fired twice in succession, both rounds striking the defendant with fatal results.

9. In possession of a state search warrant, one SA and four State and Local officers knocked on an apartment door and announced their authority. Sounds emanated from the rear of the apartment suggesting that drugs were being destroyed. The SA used forced entry and proceeded to the bathroom where he observed the defendant flushing the toilet. The SA identified himself and ordered the defendant away from the toilet. The defendant was then removed to another part of the bathroom. Noticing that the toilet was filled with foil packages, the SA reached in and removed several packages. The defendant then struck him several times in the rib cage, knocking him against the wall. The SA stood up and pushed the defendant into a corner. The attacks occurred twice more. After the third attack, the SA struck the defendant once on the head with his pistol to eliminate the possibility of being hit again. No injuries.

10. In possession of an arrest warrant, two SA's entered an apartment to arrest one defendant (a total of five persons were in apartment during the arrest situation). Five SA's and four State and Local officers remained outside on surveillance. The SA's displayed their identification and arrest warrant to the defendant. At that point, two surveillance SA's gained entrance through the rear of the residence and started toward the basement area. All the occupants, including the defendant, then ran to the basement followed by surveillance officers. In the basement area, the occupants struggled with both SA's and attempted to gain possession of their service revolvers. Calm was eventually restored and the subjects were placed under arrest. No injuries.

Automobile

1. In the process of executing a state search warrant, three Task Force officers (one in full uniform) and two SA's arrived at residence. Shortly afterwards, a vehicle with three defendants inside pulled into driveway. Upon noticing the officers, defendants began to back out. The three Task Force officers approached, identified themselves and ordered vehicle to stop. Vehicle continued backing up at a high rate of speed. Upon reaching the street, vehicle began moving forward. Two of the Task Force officers took position in street directly in front of the vehicle. The vehicle travelled directly toward one officer knocking him to ground. He then fired his weapon in an attempt to halt the vehicle. Vehicle then proceeded forward toward the other officer, knocking him to the ground. He also fired at the vehicle. The third Task Force officer, thinking that both officers had been shot, then opened fire. Two additional officers, one SA and one ATF Agent, who at the time were approaching the residence to be searched, were informed of the fleeing vehicle and gave chase. All defendants were arrested without further incident. Both Task Force officers sustained minor injuries.

2. Subsequent to halting the defendant's vehicle, two SA's exited the OGV and approached both sides of the defendant's auto. SA approaching driver's side held service revolver in his left hand and badge in his right hand, both visible to the defendant, and announced his intent. Defendant then accelerated hard left and forward striking the SA causing his service revolver to accidentally discharge. Both SA's returned to the OGV, and along with two SA's in another OGV, gave chase. SA then observed defendant's vehicle suddenly come to a halt. One OGV was driven in front of and the other to the left of the defendant's auto. All SA's exited and approached the defendant who was then taken into custody. Defendant sustained gunshot wound as a result of the accidental discharge.

3. Prior information indicated that two defendants were involved in the trafficking of large quantities of heroin. Mobile surveillance was maintained on the defendant's vehicle until the order was given to effect their arrest. At this time, two OGV's pulled up to the front and rear of defendants' vehicle. Two SA's exited, identified themselves and advised both defendants they were under arrest. As SA opened passenger door, defendant placed the vehicle in gear. SA ran to front of vehicle, identified himself again and ordered vehicle to stop. Defendant drove toward both SA's who jumped back to avoid being struck. Vehicle proceeded past SA's and down an embankment into a wooded area, crashing into a tree stump. Defendant then ran into woods with SA in pursuit. SA again identified himself and advised defendant to exit the woods. A short time later, defendant returned and was advised that he was under arrest for assault. SA, noticing that defendant was unarmed, placed his service revolver in waistband. As he did so, defendant again attempted to flee but was tackled in the process. A brief struggle ensued, after which the arrest was effected. Other defendant was arrested without incident. No injuries.

4. After execution of search warrant, two SA's remained in the area in an attempt to apprehend defendant upon his arrival home. Defendant accompanied by another individual later drove past the residence. Both SA's followed until defendant exited his vehicle. SA's then identified themselves at which time defendant returned to auto and sped away, striking one SA with the vehicle. SA's returned to OGV and gave chase. After searching the area with negative results, SA's returned to defendant's residence advising subject's mother of his escape. After several phone calls, she contacted and persuaded her son to return home. Subject later arrived and surrendered. No injuries.

5. Information indicated that defendant would be delivering a quantity of heroin via auto. A decision was reached to effect the arrest at a designated intersection. Upon arrival of defendant, OGV's pulled up to the front, rear and right side of defendant's vehicle (all OGV's utilized flashing beacons). SA ran to passenger door, identified himself, ordering defendant to freeze. SA, noticing that defendant had moved his hands toward wheel and gear shift, attempted to open passenger door with negative results. Defendant placed vehicle in reverse and backed into one OGV. Defendant then accelerated toward one SA. At this time, SA, who was attempting passenger door entry, discharged three rounds into the rear of defendant's vehicle. Defendant fled, pursued by five OGV's. Defendant later

lost control of vehicle, which spun out next to a junkyard. Upon arrival, the SA's observed defendant's vehicle stopped with driver's door open. A search was initiated with defendant found hiding under an abandoned auto. He was then placed under arrest. No injuries.

6. after observing one of two defendants placing suitcases in trunk of auto, surveillance SA's approached. Noticing the arrival of both OGV's, defendant entered auto and attempted to depart. Both OGV's blocked exit at which time defendant attempted to go between the OGV's. Failing, he backed up. As surveillance officers approached on foot, defendant accelerated toward one officer. With weapons drawn, surveillance ordered defendant to stop. He complied only after one SA had fallen across hood to avoid being run over. Other defendant was arrested without further incident.

7. After receiving information that defendant was soliciting funds for purchase of marihuana and amphetamines, one SA and one Task Force officer proceeded to parking lot to await defendant's arrival. Upon his arrival, OGV was driven in front of defendant's vehicle and both officers exited. Task Force officer approached driver's side with ID in hand. Defendant accelerated causing Task Force officer to jump back. Both officers pursued. Defendant attempted to ram OGV three or four times during chase. After another near collision, Task Force officer fired one round into right side of vehicle bringing it to a stop. Defendant was then arrested. No injuries.

8. Two teams of SA's assumed surveillance in a field adjacent to a river. SA's were concealed between and under various abandoned vehicles. Intent was to apprehend two defendants, one of whom was a swimmer expected to exit river with six kilograms of cocaine. Defendant, to whom cocaine was to be delivered, entered field and parked at the foot of the river. Shortly after movements were observed in the water, defendant started his car and proceeded toward vehicle occupied by informant and undercover SA. After parking, defendant exited and stood next to informant's vehicle. At this time, two SA's identified themselves in both Spanish and English and shouted for defendant to freeze. Defendant ran to his vehicle, entered the driver's side and was observed to be reaching under the front seat while,

at the same time, accelerating vehicle in the direction of one SA who was approaching from the front. Believing that defendant was reaching for a weapon and about to run over SA, the arresting SA's opened fire. Defendant escaped immediate area but was pursued and arrested by surveillance without further incident. At the time of arrest, a pistol was seized from the purse of defendant's companion. No injuries. It should be noted that due to radio malfunction, contact between surveillance teams and observation post was lost.

Open Area

1. Information was received from a wholesaler indicating that a half shipment of quaaludes would be diverted. After meeting with company officials, SA's substituted a package containing 100 quaaludes from the original 9,600 shipment. Three defendants were initially arrested and agreed to cooperate. Plans were then formulated to effect the arrest of the final two defendants, As arranged, an undercover SA and informant inside CI's vehicle followed the two defendants to a designated location. (Substitute package was located in trunk of CI's vehicle). Both defendants exited their vehicles and proceeded to informant's vehicle. The informant then exited his vehicle as planned. All three individuals engaged in conversation near the rear of CI's vehicle. After a few minutes, trunk of CI's vehicle was lifted (arrest signal) but was quickly lowered as a surveillance vehicle approached. A short time later, trunk was lifted again. Undercover SA and surveillance officers then exited their vehicles. After identifying himself, undercover SA attempted to arrest one defendant, who resisted and tried to escape. SA, while struggling with defendant on the ground, was struck in the face. After defendant was subdued, a search revealed a loaded gun. Other defendant was arrested without a struggle. No injuries.

2. Three SA's observed two defendants standing on street corner. Defendants were to be arrested in connection with cocaine delivery. The SA's approached and announced their office. One defendant was then placed under arrest. At that time, the other defendant made a remark about law enforcement officials. SA then turned toward this individual and was physically struck by him. Subject was then subdued with necessary force and placed under arrest. No injuries.

3. In possession of an arrest warrant, two SA's observed the defendant enter a vehicle on the passenger side. The OGV was then driven in front of defendant's vehicle. Both SA's exited, identified themselves and ordered defendant to step out and place his hands on the roof of the vehicle. After ignoring at least three repeated demands, the defendant finally exited and, with gun in hand, moved in a crouched position to the rear of the vehicle. Both SA's approached and, as one SA neared the rear of the vehicle, the defendant aimed his gun at him. (Subsequent investigation indicated that defendant's weapon misfired due to faulty ammunition). The SA responded by firing three shots at defendant. Stepping to the rear of the vehicle, the SA observed the defendant crouching with the pistol in hand facing the other SA. The SA then fired a fourth shot, wounding the defendant. The defendant began struggling at which time the SA struck him on the head with his pistol which discharged. Both SA's then subdued the defendant.

Airport Terminal

1. During inspection of arriving flights, two SA's approached a defendant, identified themselves and requested defendant's identification. SA's then asked defendant to accompany them to another location for further questioning. At this time, defendant struck both SA's in chest with forearm and clenched fist. Pursued by four SA's, defendant exited passenger tunnel and entered parking lot. During chase, SA's observed defendant place his hand in jacket pocket. Thinking that defendant was attempting to draw a weapon, two SA's withdrew their service revolvers and commanded him to stop. Defendant turned and yelled "don't shoot". He then removed the heroin from his pocket and tossed it over the Fence. Defendant was arrested without further incident. No injuries.

Airport First Aid Room

1. Two SA's, on routine inspection of arriving flights, identified themselves to defendant and asked him to accompany them to first aid room. After entering, defendant attempted to flush the heroin down the sink. A brief struggle ensued. Defendant was then subdued and placed under arrest. No injuries.

Airport Restroom

1. SA, on inspection of arriving flights, followed defendant to airport terminal entrance. SA identified himself and asked defendant to accompany him to airport restroom. After entering, defendant ran to restroom stall and attempted to flush heroin packet down the toilet. SA followed and removed packet. After struggling, SA then forcibly removed defendant from restroom. No injuries.

Carport

1. In possession of a search warrant, two teams of Task Force officers approached the front and rear of a private residence. Other officers remained in the immediate vicinity. After observing four defendants inside a pickup truck parked in the carport of the residence, two Task Force officers approached, identified themselves and ordered the defendants to exit the vehicle. After exiting, one defendant physically struck one of the officers on the jaw. The officer retaliated by striking the defendant in the mouth. During the incident, another defendant attempted to assault the officer but was restrained by a third Task Force officer who had entered the carport. Two additional Task Force officers then approached the carport and, after seeing that the situation was under control, proceeded to secure the residence. Returning to the carport, one of the officers approached the defendant, who had assaulted the arresting officer, identified himself and stated that he was in possession of a search warrant. The defendant then struck the officer with his fist. A struggle ensued between the defendants and the arresting officers. All defendants were eventually handcuffed and arrested. One Task Force officer was hospitalized and treated for a fractured nose, eye and lip bruises.

BRIEF
APPENDIX B

BRIEF APPENDIX B

DRUG AGENTS GUIDE
TO
SEARCH & SEIZURE

Written by

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U.S. Department of Justice

1978

WARNING

The rules contained in this Guide are based upon the Fourth Amendment to the United States Constitution, as interpreted by the Supreme Court and by a majority of lower federal courts. A few of the rules have been interpreted or applied differently by a number of lower courts, both state and federal. Moreover, many states impose tougher restrictions on police conduct than the federal Constitution does. It is imperative, therefore, that you

CONSULT YOUR PROSECUTOR OR LEGAL ADVISOR BEFORE APPLYING THE RULES CONTAINED IN THIS GUIDE! [(ii)]

DRUG AGENTS GUIDE TO SEARCH & SEIZURE

by Harry L. Myers
Office of Chief Counsel
Drug Enforcement Administration

I. Introduction

It is extremely difficult today to obtain a good working knowledge of search and seizure law. First, the sheer number of cases being decided on the subject makes it impractical to stay current with every small change or interpretation handed down by the courts. The volume of cases decided, almost on a daily basis, is overwhelming. Second, many of the reported decisions conflict with one another. Trying to extract rules from these decisions, which can be confidently applied in future investigations, is always frustrating and frequently impossible. Third, there are countless factual situations involving Fourth Amendment protections which have never been resolved by the courts. How can an agent be expected to cope with so many unknowns? Finally, assuming the conflicting decisions could be resolved and a rule could be found for every case, how could a law enforcement officer learn such a large body of law?

In spite of these hurdles, drug enforcement officers must develop a practical knowledge of search and seizure law. Without it, they run the risk of violating constitutional rights, they jeopardize the successful prosecution of their cases, and they expose themselves to civil lawsuits for damages.

The solution to this dilemma—the absolute need to learn the law, on the one hand, and the many hurdles to learning, on the other—lies in a two step approach: [-6-]

(i) LEARNING THE CLEAR-CUT RULES, and

(ii) DEVELOPING A LOGICAL SYSTEM TO APPLY THE RULES TO ANY PROBLEM. [-7-]

A knowledge of the basic rules is essential. These core principles are applicable to every case, they remain unchanged for long periods of time, and they are recognized and accepted by virtually every court. Learning these clear-cut rules is the first step to learning the law.

Developing a thorough, systematic approach for applying these rules to most factual situations is equally essential. Analyzing a problem, identifying the legal questions, and selecting the correct legal rules, should not be a "hit or miss" proposition. A logical approach is needed: one that insures a more thorough analysis, prevents jumping to "gut" conclusions, and makes complex situations easier to solve by breaking them down into smaller, simpler, problems. Cromberg, et al., *On Solving Legal Problems,* 27 Journal of Legal Education 165 (1975).

These two steps offer the best way to develop a working knowledge of search and seizure law in the least amount of time. An officer cannot memorize the rule of law for every possible case he will encounter. Learning the basic rules and knowing how to apply them offers a way to cope with the endless variations that must be faced. [-7-]

* * *

4. Search Can't Exceed Warrant's Scope

A search warrant restricts the search to only those places, and for only those objects, described in the warrant. The search cannot exceed this scope.

a. *Areas to be Searched* [-78-]

* * *

3) *Persons on Premises*

A search warrant for premises does not automatically authorize a *full* search of persons either found on the premises or who come onto the premises while the search is in progress (*U.S.* v. *Di Re.* 68 S.Ct. 222, 1948; *U.S.* v. *Festa,* 192 F. Supp.

160, DC Mass. 1960; *Smith* v. *State,* 289 So 2d 816, Ala. 1974; *State* v. *Bradbury,* 243 A.2d 302, N.H. 1968; *State* v. *Carufel,* 263 A.2d 686, R.I. 1970; *State* v. *Fox,* 168 N.W. 2d 260, Minn. 1969; *State* v. *Massie,* 120 S.E. 514, W.Va. 1923; *People* v. *Smith,* 234 N.E. 2d 460, N.Y. 1967; *Purkay* v. *Maby,* 193 P. 79, Idaho, 1920).

If, on the other hand, the persons on the premises or coming onto the premises are connected to the illegal activity, and could be concealing objects named in the warrant, they can be searched for those objects (See *U.S.* v. *Peep,* 490 F.2d 903, 8 Cir. 1974; *U.S.* v. *Micheli,* 487 F.2d 429, 1 Cir. 1973; *U.S.* v. *Johnson,* 475 F.2d 977, DC Cir. 1973).

It is not clear whether you need probable cause or simply a reasonable suspicion to believe persons on premises are concealing items named in the warrant, but you must be able to articulate some facts which make it likely.

Example. You have probable cause to believe Charlie is distributing drugs to a steady stream of buyers visiting his house trailer. You get a valid warrant to search the trailer and Charlie for drugs. While executing the warrant you find marihuana, scales, plastic baggies, rolled marihuana cigarettes, methamphetamines and other drug paraphernalia. [-79-]

The phone rings. You answer it. A man asks for Charlie. You say "He's busy, but come on over." Within a few minutes a man knocks and you let him in. He is carrying a brown paper bag. Does the warrant permit you to conduct a full search of this visitor?

Yes. Although a search warrant for premises does not automatically extend to persons on the premises, you have sufficient facts and circumstances to believe the visitor is there either to buy from or to supply Charlie with drugs, and that he may be concealing items named in the warrant. Therefore, he can be searched (See *Earnest* v. *State,* 314 So. 2d 796, Fla App. 1975).

Example. You have probable cause to believe that Milt is involved in drug trafficking and that he stores large quantities of heroin at his barber shop. You have no indication that Milt is selling to shop customers. You obtain a warrant to search Milt and his shop. You execute the warrant at noon on a business day. While you are searching, a clean-cut male, dressed in a three-piece suit comes to the shop and you let him in. One of the barbers tells him the shop is closed and to come back tomorrow. You know nothing about the man. May you subject him to a full search under the warrant? [-80-]

No. There is no evidence that the shop is retailing drugs to a steady stream of customers. You have no information to link the visitor to criminal activity. The man is likely to be an innocent customer who knows nothing of Milt's activities. Therefore, the warrant to search the shop does not extend to him (See *Smith* v. *State,* 227 S.E. 2d 911 Ga. App. 1976; *Smith* v. *State,* 289 S.2d 816, Ala. 1974; *U.S.* v. *Branch,* 545 F.2d 177, DC Cir. 1976). [-81-]

* * *

5. Protective Measures

A search warrant is an order issued by a judicial officer in the name of the government, commanding an officer to conduct a search for specified objects.

Persons do not have the right to forcibly resist the execution of a search warrant, even though the warrant may later be held to be invalid (*U.S.* v. *Ferrone,* 438 F.2d 381, 3 Cir. cert. den., 91 S.Ct. 2188, 1971).

a. **Anything Necessary and Proper.** Subject to department restrictions (for example, restrictions on the offensive use of firearms) and to restrictions imposed by statute, you may do whatever is necessary and proper under the circumstances to execute the warrant (*Clifton* v. *Cox,* 549 F.2d 722, 9 Cir. 1977).

b. **Securing Persons.** You can restrict the movement of persons on the premises both to protect yourself and to prevent interference (*U.S.* v. *McKethan,* 247 F. Supp. 324, D.DC. 1965) [-83-]

You *may* be justified in frisking persons found on the premises for your protection while executing the search. See the "Stop & Frisk" section of this outline for a discussion of the right to frisk.

Remember: Your right to secure the persons found on the premises does not automatically include the right to conduct a *full* search of their person.

c. **Securing Weapons.** You have the right to locate and take temporary possession of any weapons in the area which you reasonably believe could be used against you (*U.S.* v. *Chapman,* 549 F.2d 1075, 6 Cir. 1977; *U.S.* v. *Bowdach,* 414 F. Supp. 1346, SD Fla. 1976; *U.S.* v. *Gilbert,* 378 F.Supp. 82, WD So. Dak. 1974; *U.S.* v. *James,* 408 F. Supp. 527, SD Miss. 1973).

Of course, once the search is over and the danger has passed, continued possession of the weapon cannot be justified as a safety measure. Unless some other justification exists for retaining the weapon it must be returned to the owner (See the "Plain View" section of this outline). [-84-]

* * *

BRIEF

APPENDIX C

BRIEF APPENDIX C

THE PEOPLE OF THE STATE OF ILLINOIS, ***Plaintiff-Appellee,*** **vs.** **GLORIA MILLER,** ***Defendant-Appellant.***	Appeal From The Circuit Court of Cook County. — Honorable **WARREN D. WOLFSON,** Judge Presiding.

Mr. JUSTICE O'CONNOR delivered the opinion of the court:

Defendant, Gloria Miller, was indicted on two counts of possession of a controlled substance. After a bench trial, defendant was found guilty as charged. The circuit court of Cook County sentenced her to concurrent terms of imprisonment of 4 to 6 years on count one and 1 to 3 years, plus a $1,000 fine, on count two. Defendant appeals the judgments of conviction, contending only that the trial court erred in denying her motion to quash her arrest and suppress physical evidence.

Officer Cleophus Johnson was called as a witness on the motion to suppress. Johnson testified that on April 25, 1975, at about 12:45 a.m., his partner, Officer Nathan Gibson, eight to ten other officers and himself had occasion to execute a search warrant. The warrant stated that there was probable cause to believe that a quantity of heroin was located upon the person of Carolyn Harris and in her third floor apartment in Chicago. The officers were in plain clothes and forced their way through the front door by using crowbars and sledge hammers. They searched the apartment for about one to one and one-half hours, discovering a quantity of narcotics and three handguns. As a result, James and Carolyn Harris were arrested for possession of narcotics.

According to Johnson, about an hour and one-half after the officers' entry, while they were concluding their search in the living room, he heard a knock at the rear door. When he first saw the defendant, she and a male companion (Earl Charles) had entered through the back door and were walking to the living room. Johnson testified that he did not draw his gun and did not see Gibson's weapon drawn. Nor did the officers order defendant or her companion to enter the apartment.

Johnson further testified that the officers asked Charles who he was, why he was there and whether he lived there. His response, if any, is not of record. Approximately two to three minutes after defendant and Charles entered the apartment, the officers searched Charles and recovered a weapon. Johnson testified that at the time of this search defendant was not free to leave. A few minutes later Johnson noticed a large bulge in defendant's pants. Upon questioning, defendant replied that it was a sanitary napkin. Officer Johnson told her, "it wouldn't stick out like that" and said she would have to be handcuffed until she was searched by a police matron. According to Johnson, Charles whispered to defendant that she "might as well give it to him." At this point defendant proceeded to the bathroom accompanied by the officers. She unzipped her pants and removed two clear plastic bags containing a brown narcotic powder. Defendant was arrested and transported to the police station, where she produced more narcotics from her bra.

On cross-examination, Johnson testified that the rear door of the apartment leads to an enclosed porch. The majority of the officers involved in the search had already left the premises when defendant arrived. He indicated that the bulge in defendant's pants was pointed and could have been another weapon. When defendant was walking to the bathroom, Johnson remained close behind her.

On redirect-examination, Johnson explained that when defendant and Charles knocked on the door, the officers had already searched every room in the apartment, but were making a final search of the living room. Officer Johnson also testified concerning his safety:

"Q You said when you saw the bulge you believed in your mind that it was a weapon, is that correct?

"A Yes.

"Q You didn't have a weapon drawn?

"A No.

"Q Therefore, Officer, were you in fear for your safety at this point?

"A Not at this point.

* * *

"Q At anytime that evening before she gave you some objects from her pants were you in fear of your safety because you thought she had a weapon in her pants?

"A No.

* * *

"Q When did you feel that your safety was in danger?

"A If I turned my back she would have a chance to go in her pants, but as long as I was facing her, I didn't feel—

* * *

"Q Did you ever turn your back on Gloria Miller?

"A No."

Defendant was not handcuffed until she was arrested. On recross-examination, Johnson explained that if defendant made a move, he could keep physical control.

Johnson's partner, Officer Nathan Gibson, also testified at the suppression hearing. Gibson stated that at about 2 a.m., he and Johnson first encountered defendant and Charles in the kitchen. He observed that the door between the kitchen and the enclosed porch was open. There was a wooden door from the porch to the outside which had a lock.

Gibson was the first officer to confront defendant and he had his weapon drawn. He testified that Johnson was behind him and did not have his weapon drawn. Gibson informed the couple that a "flash raid" was being conducted. Charles said he had come to see Carolyn Harris. According to Gibson, he did not point his weapon at the couple and neither officer directed them to enter the apartment. The officers frisked Charles and recovered the handgun. Gibson subsequently noticed a large bulge shaped like a half moon in the crotch of defendant's pants. When Gibson questioned defendant about the bulge, she said it was contraband. Charles told her to give the contraband to the officers. She surrendered the contraband, was arrested and advised of her rights. At the station she informed the police she had more contraband in her bra.

Defendant did not make any movements or gestures to indicate to the officer that he had reason to fear for his safety. Nonetheless, Gibson was cautious because of the handguns previously recovered and because defendant had not been searched. He did not turn his back on defendant. Gibson also stated that from the moment defendant entered the apartment she was not free to leave.

Officer Gibson further testified as to his frame of mind upon encountering defendant and Charles:

> "* * * [W]e were conducting this raid, and when I met Gloria Miller and Earl Charles in the kitchen in the area, I did not know why they were there. And when they informed me they wanted to see Carolyn Harris, whom we had a search warrant for, and her premises, I felt that it was necessary to conduct a protective search of the male."

Gibson stated that it was his intention to conduct an investigatory "field interview" of the couple upon their entry.

James Harris testified for the defendant that on April 25, 1975, he lived with his wife and two small children in the third floor apartment named in the warrant. He had gone to bed at about 4 p.m. and was awakened between 9 and 10 p.m. by policemen breaking down the front door. The police conducted a search of the apartment and ultimately arrested James and Carolyn Harris.

According to Harris, between 3 and 3:30 a.m. he was sitting handcuffed in the living room with his wife, two children, and Officers Kelly, Johnson and Gibson. They were waiting for Carolyn Harris' mother to arrive to pick up the children before being transported to jail. All the other officers had left the premises; the search had been completed 30 to 45 minutes previously and the officers were listening to his stereo.

At this time and under these circumstances, there was a knock at the back door of the apartment. Harris testified that this door led outside of the apartment and was padlocked and secured from the inside by an iron bar, commonly called a police lock. Inside this door was an enclosed porch. French doors separated the porch from the kitchen. Harris further testified that Officers Johnson and Gibson went to answer the door. It took them two to three minutes to operate the police lock and open the door. Both officers were in the enclosed porch area. Gibson opened the door, directed defendant and Charles inside with a waving motion of his left hand, and with his right hand pointed his service revolver out the door.

The trial court considered all of the above evidence and made certain findings of fact. Initially, the court found that:

> "* * * [T]o place the testimony of Officer Gibson alongside the testimony of Officer Johnson, the only reasonable conclusion would be that they are not credible

witnesses, that the contradictions in their testimony, I think, are unexplainable. I won't go down the entire list of them."

The court found Harris' testimony credible and accepted it for the purpose of its opinion.

After resolving credibility, the trial court stated additional findings which follow in pertinent part:

"There was a knock on the door in the early morning hours of April 25th of 1975. The police were on the premises, had conducted a search pursuant to a lawful warrant, * * *.

"I find the police invited, and I use the term invited in much the same way the Court use [sic] directed in Pugh, invited Gloria Miller and Earl Charles, her companion, into the premises; one officer having his gun drawn at least. And I find further that it was not a voluntary entry onto the premises.

"I further find that the police were on the premises for a proper purpose, that they had at that point already found contraband during a lawful search and were in the process of * * * taking the Harrises into custody.

"I find that while the search itself had been completed, the police were still in the place where they had a right to be and that they were waiting for somebody in the family to arrive to care for the children of Mr. and Mrs. Harris.

"I further find that three handguns had been found in the apartment before Gloria Miller entered the premises."

Under these facts, the trial court ruled that Ill. Rev. Stat. 1975, ch. 38, par. 108-9, and *People* v. *Pugh* (1966), 69 Ill. App. 2d 312, 217 N.E.2d 557, enabled the officers to legally require defendant and Charles to enter the premises. Moreover, the court believed the officers had a right to frisk them for weapons.

The sole issue on appeal is whether, pursuant to Ill. Rev. Stat. 1975, ch. 38, par. 108-9 and decisional law, the police may order a citizen not on the premises nor named in the search warrant to enter and subject themselves to a search.

For purposes of this opinion we accept, in substance, the trial court's findings of fact. However, we find the officers had no legal right to force defendant onto the premises and search her. Accordingly, we reverse and remand.

Preliminary to determining whether the search was valid, the State does not contend that defendant acted voluntarily in turning over the contraband stored in her pants. Thus, they have conceded that presenting defendant with the choice of cooperation or handcuffing and subsequent search by a police matron constituted a search under the fourth amendment. (U.S. Const., amend. IV.)

Ill. Rev. Stat. 1975, ch. 38, par. 108-9 provides:

"In the execution of the warrant the person executing the same may reasonably detain to search any person in the place at the time:

(a) To protect himself from attack, or

(b) To prevent the disposal or concealment of any instruments, articles or things particularly described in the warrant."

The thrust of the statute is that by virtue of the authority to search the premises, it is sometimes permissible to search persons on those premises. The statute does not expressly state that the officer must have probable cause to believe one on the premises possesses a weapon or the items described in the warrant. However, the language "reasonably detain to search" suggests that the officer must be prepared to show some reason to suspect that the person on the premises might attack him or attempt to dispose of or conceal items named in the search warrant. (*People* v. *Dukes* (1977), 48 Ill. App. 3d 237, 363

N.E.2d 62.) An additional requirement, not apparent from the face of the statute but implied by decisional law, is some showing that the person searched have some connection with the premises. *People* v. *Campbell* (1979), 67 Ill. App. 3d 748, 753, 385 N.E.2d 171; *People* v. *Dukes.*

In applying this statute to the case at bar, we must also consider the relative timing of the apartment search and defendant's non-voluntary entry. The Committee Comments to section 108-9 recognize that the need for a search usually arises "* * * when the officer first arrives at the place where the goods are to be seized." Further language is also instructive:

> "* * * The need for this power arises most often in the narcotics cases where disposition is most easily effected.
>
> * * *
>
> "* * * Furthermore, if a judge decides there is probable cause for issuing the warrant in the first place, then this power given to the officer which is parasitic to the warrant should not be considered excessive in the hands of the executing officer." Ill. Ann. Stat., ch. 38, par. 108-9, Council Commentary, at 271 (Smith-Hurd, 1973).

However, to ensure that the power given the executing officer is not excessive, the timing of a search pursuant to the statute must be strictly construed. (*People* v. *One 1968 Cadillac Automobile* (1972), 4 Ill. App. 3d 780, 281 N.E.2d 776.)

> "* * * The statute does not grant to police the power to search someone at their leisure. The need for the search is immediate, and it must be conducted at the earliest opportune moment after the danger presents itself. * * *"
>
> 4 Ill. App. 3d, at 787, 281 N.E.2d, at 781.

Moreover, the language "may reasonably detain to search" must be strictly construed in light of the teaching of the United States Supreme Court in *Delaware* v. *Prouse* (March 27, 1979), 47 U.S.L.W. 4323, and *Terry* v. *Ohio* (1968), 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889. *Terry* and *Prouse* indicate that a

detention is a "seizure" within the meaning of the fourth amendment even when the purpose of the stop is limited and the resulting detention is quite brief. Accordingly, when defendant and Charles were "invited" into the apartment at gunpoint and made a non-voluntary entry, their detention constituted a seizure within the meaning of the fourth amendment. Officers Johnson and Gibson both testified that defendant was not free to leave.

Classifying defendant's detention as a "seizure" does not end our inquiry, however. The fourth amendment only prohibits unreasonable searches and seizures. The reasonableness, and hence the permissibility, of a particular law enforcement practice is judged by balancing the intrusion on an individual's fourth amendment interests versus promotion of a legitimate government interest. (*Delaware* v. *Prouse* (March 27, 1979), 47 U.S.L.W. 4323.) In accordance with the teaching of *Terry* and *Prouse,* we construe the language "reasonably detain to search" to require that the executing officer can express at least an articulable and reasonable suspicion that either a search or a detention (or both) is for an enumerated purpose of section 108-9. By this requirement the courts will be provided with a record containing specific articulable facts which, together with rational inferences from those facts, will indicate whether either of the twin functions of section 108-9 is met and, accordingly, whether either the search or the seizure (or both) is reasonable. *Delaware* v. *Prouse; Terry* v. *Ohio.*

Applying these principles to the facts of the instant case, we conclude that the seizure and search of defendant were unreasonable and did not comport with the requirements of section 108-9. Initially, strict compliance with the statute only enables detention and search of any person on the premises at the time the warrant is executed. The trial court found that the search had been completed. This finding is supported by Harris' testimony that the search ended 30 to 45 minutes prior to defendant's arrival. Nonetheless, the trial court believed that

since the police were still on the premises for the lawful purpose of taking the Harrises into custody, the statute was satisfied. Such an expansive reading of section 108-9, however, contravenes its purpose as indicated by the Committee Comments: The need for a search arises " * * * when the officer first arrives at the place where the goods are to be seized." Ill. Ann. Stat., ch. 38, par. 108-9, Council Commentary, at 271 (Smith-Hurd, 1973).

The trial court's belief that *People* v. *Pugh* (1966), 69 Ill. App. 2d 312, 217 N.E.2d 557, was dispositive was erroneous since that case is distinguishable. In *Pugh,* defendant was admitted at the direction of the officers while the search of the premises was in progress. His detention and search occurred about fifteen minutes after the officers entered the apartment and before the officers had discovered any contraband in the apartment. The *Pugh* court further indicated that:

> " * * * We agree with the State that the execution of search warrants in narcotics cases is a risky business at best, and unless the police search all the persons present on the premises they endanger both themselves and the search they are making. Furthermore, the entry of the defendant onto premises where the police have reason to believe narcotics are concealed provides further grounds for his search. * * * "
>
> 69 Ill. App. 2d, at 316; 217 N.E.2d, at 559.

The circumstances in the instant case differ since the premises had been thoroughly searched, handguns and narcotics had already been recovered, and the residents had been arrested. The officers' reliance on section 108-9 was not well founded because its purpose had been attained by their successful execution of the warrant and the ensuing arrests. *Pugh* is also distinguishable because there is some indication that Raymond Pugh was the brother of Jessie Pugh, the resident named in the warrant. See *People* v. *Campbell* (1979), 67 Ill.

App. 3d 748, 750, 385 N.E.2d 171. Defendant's connection with the premises described in the warrant is not apparent.

The State contends that the requisite connection was established through Harris' testimony that he had known the defendant and Charles for one to one and one-half years. They had previously visited his apartment and on at least one occasion had been there at 3 to 4 a.m. Clearly, defendant and Charles had a greater connection with the premises than the defendant in *People* v. *Dukes* (1977), 48 Ill. App. 3d 237, 363 N.E.2d 62. Dukes was an innocent stranger who had mistakenly entered premises being searched. Defendant and Charles were guests and acquaintances of the Harrises. However, the *Dukes* court indicated that connection with the premises may mean more than a social guest:

> " * * * [T]he record articulates no facts indicating that the defendant had any connection with the premises described in the warrant. The defendant was not on the premises when the police officers arrived to execute the warrant, nor does it appear that the defendant lived on the premises or was related to anyone who lived there."
> 48 Ill. App. 3d, at 240, 363 N.E.2d, at 64.

See also W. LaFave, *Search and Seizure: Course of True Law,* 1966 U. of Ill. Law Forum 255, at pp. 271-273 (concerning the requirement of connection with the premises). Compare *People* v. *Campbell* (1979), 67 Ill. App. 3d 748, 385 N.E.2d 171 (defendant, who was a resident of the premises and entered without knocking while police were conducting a search, deemed to have sufficient connection with the premises).

Moreover, the record fails to indicate that the officers knew defendant had sufficient connection with the premises. Johnson testified that Charles was asked who he was, why he was there and whether he lived there. His response, if any, and any questioning of defendant are not of record. Gibson testified

that Charles told him he had come to see Carolyn Harris. Even if we accept the officer's testimony in a light most favorable to the State, defendant was merely a visitor arriving after a completed search. Accordingly, under these circumstances, we find that defendant lacked sufficient connection with the premises to justify her seizure and search.

We turn next to the twin purposes of section 108-9 to review whether the officers complied with the "reasonably detain to search" language of the statute. In other words, we review the record to see if the officers manifested specific articulable facts which, together with rational inferences from those facts, indicated the necessity to protect themselves from attack or to prevent disposal or concealment of contraband described in the warrant.

The State contends that the police reasonably believed that defendant might attack them. They had discovered three handguns in the apartment prior to the arrival of defendant and Charles and had found a weapon on Charles. However, at the point when defendant and Charles were "directed" to enter the apartment, Officer Gibson had his service revolver drawn and pointed. Johnson's testimony, reported above in pertinent part, clearly indicates that he was never in fear for his safety. He explained that he believed he could maintain physical control over defendant so long as he did not turn his back on her. Gibson testified he was apprehensive and cautious because handguns had previously been recovered. Yet, since he had his service revolver drawn, it is apparent that he, too, was in control. Both officers indicated they did not turn their backs on defendant and kept close proximity to her. Defendant made no furtive movements to indicate to the officers that they might be in danger.

Furthermore, in light of the trial court's opinion that Johnson and Gibson were not credible witnesses, we doubt the validity of their testimony that defendant may have had a gun

stored in the crotch of her pants. Johnson indicated that the bulge was pointed and might have been a weapon. Gibson testified the bulge was half-moon shaped and large. In short, we agree with defendant that the officers' testimony concerning the bulge in her crotch area is hardly consistent with the possibility of a concealed weapon. Accordingly, we find the record does not support a finding that the officers reasonably suspected an attack.

Finally, we also conclude that there is no showing that the police reasonably suspected defendant would destroy or conceal items described in the warrant. The State concedes that the record is silent as to whether either officer believed that defendant possessed any narcotics named in the warrant or might attempt to conceal or dispose of such items. Nonetheless, the State contends there is circumstantial justification for a reasonable belief that defendant was engaged in narcotics activities. Narcotics had been recovered from Carolyn Harris. Defendant and Charles knew the Harrises and had previously visited them. This visit occurred at about 3 a.m. and the police observed a bulge in defendant's pants.

We do not agree. Defendant was not even on the premises when the officers entered and began their search. When she did enter, the premises had been thoroughly searched, evidence gathered and the perpetrators handcuffed. The Committee Comments indicate that the need to search individuals not listed in the search warrant for items described in the warrant arises when the officers first arrive and execute the warrant. Accordingly, since the warrant had been successfully executed, there was no showing defendant would destroy or conceal items described in the warrant.

For the foregoing reasons, we find the detention to search defendant was unreasonable and we reverse the order of the circuit court of Cook County denying defendant's motion to

quash arrest and suppress physical evidence. Because defendant's arrest is quashed and because the sole evidence against defendant is evidence found as a result of the search, the judgment of conviction must be reversed. *People* v. *Bowen* (1963), 29 Ill. 2d 349, 194 N.E.2d 316, *cert. denied* (1964), 376 U.S. 927.

Reversed.

McGLOON and CAMPBELL, JJ., concur.